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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

Editor—Right Hon. Sir FREDERICK POLLOCK, Bart, K.C.

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1935—Ch.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C.1
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Printed by WATERLOW & SONS LTD., LONDON WALL, LONDON.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

GISSING *v.* LIVERPOOL CORPORATION.

[1933. G. 886.]

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Feb. 15.
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Superannuation—Poor Law—Employee of board of guardians—Contributory Scheme—Failure to deduct contributions from wages—Subsequent deduction of proper contribution and of further sum weekly in respect of arrears—Guardians abolished—Transfer to local authority—Rights of employee after transfer—Poor Law Officers' Superannuation Act, 1896 (59 *&* 60 *Vict. c.* 50), *ss.* 12, 13*—Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *ss.* 113, 119; *s.* 124, *sub-s.* 1; *s.* 134.

The Local Government Act, 1929, s. 124, sub-s. 1, provides:—

" Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896 . . . . , have been made is, by virtue of this Act, transferred to the service of any council, then, if the council to whose service he is transferred have no superannuation scheme or if, in the case of an officer transferred to the service of a council who at the appointed day have such a scheme, he gives, within three months after the appointed day, notice in writing to that council that he elects to remain subject to the provisions of the Act of 1896, that Act shall apply to him subject to such modifications as the Minister may by order direct. . . . ."

By s. 134 " 'officer' includes servant."

The plaintiff was employed from June, 1897, as a cleaner by the West Derby Board of Guardians, Liverpool, and was subject to the provisions of the Poor Law Officers' Superannuation Act, 1896, which established a contributory scheme of superannuation. Contrary to ss. 12 and 13 of that Act the guardians failed until October, 1929, to deduct any contribution from the plaintiff's

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wages, but they then commenced to make the proper deduction of 6*d.* a week, and on March 27, 1930, arranged to deduct a further 1*s.* 6*d.* a week in respect of the arrears. On April 1, 1930, the guardians were abolished and their rights liabilities and officers were transferred to the Liverpool Corporation by ss. 113 and 119 of the Local Government Act, 1929. The plaintiff duly gave notice in writing of her election to remain subject to the provisions of the Act of 1896. After the transfer the Corporation continued to make both the deductions until February 26, 1932, when they informed the plaintiff that she was not within the Poor Law Officers' Superannuation Act, 1896, and stopped making deductions and refunded her a sum said to represent the total of her contributions with interest, which she accepted under protest. She brought this action, claiming to be entitled to the benefit of the Act of 1896.

Farwell J. held that as the plaintiff had not made all the annual contributions required by the Act of 1896, s. 124, sub-s. 1, of the Act of 1929 did not apply to her. On appeal:—

Held, by the Court of Appeal (reversing Farwell J.'s decision) that the application of s. 124, sub-s. 1, of the Act of 1929 did not depend on every payment required by the Poor Law Officers' Superannuation Act, 1896, having been made, and that the plaintiff having been entitled to the benefit of the superannuation scheme under the Act of 1896 until the guardians were abolished and having, apart from a mistake of the guardians, made every effort to comply with that Act, she was a servant to whom s. 124, sub-s. 1, of the Act of 1929 applied.

WITNESS ACTION.

From June, 1897, until April 1, 1930, the plaintiff was in the employment of the West Derby Board of Guardians in the City of Liverpool as a cleaner, and was subject to the provisions of the Poor Law Officers' Superannuation Act, 1896. Before October 1, 1929, no deductions in respect of superannuation contributions, as provided by s. 12 of the Act (1), were ever made by the board from her wages and her wages were paid to her in full.

Shortly before October, 1929, the board informed the plaintiff that deductions would be made from her wages

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(1) Sect. 12: "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union shall contribute annually for the purposes of this Act a percentage amount of his salary or wages and emoluments according to the scale laid down by this Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the common fund of the union."

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by way of contribution for superannuation benefit of the weekly sum of 6*d.*, and that amount per week was duly deducted by the board from the plaintiff's wages from October 1, 1929, until April 1, 1930.

By an agreement in writing made on March 27, 1930, between the plaintiff and the board it was agreed that the plaintiff should permit and the board should thenceforth make deductions from the plaintiff's wages of a further weekly sum of 1*s.* 6*d.*, and that such further weekly sum should be treated as being in part payment of arrears of contribution for the superannuation benefit which ought to have been deducted from the plaintiff's wages before October 1, 1929. In pursuance of that agreement the further sum of 1*s.* 6*d.* was duly deducted by the board from the plaintiff's wages for the week ending March 29, 1930.

On April 1, 1930, the Local Government Act, 1929, came into force, and from that date the board ceased to exist and its duties and functions were transferred to the defendants. By virtue of s. 119 (1) and s. 121, sub-s. 1 (2), the plaintiff became the servant of the defendants and she was entitled to receive the same salary as she had been receiving from the board. In June, 1930, the plaintiff, pursuant to s. 124, sub-s. 1 (3), gave notice to the defendants that she elected to

(1) Sect. 119: "Subject to the provisions of this Part of this Act, any person who having been on the twelfth day of November, nineteen hundred and twenty-eight, an officer of a poor law authority is at the appointed day an officer of the same or any other poor law authority shall on the appointed day, as respects that office, be transferred as follows."

(2) Sect. 121, sub-s. 1: "Every transferred officer shall hold office by the same tenure and on the same conditions as immediately before the appointed day, and while performing similar duties shall, in respect thereof, receive not less salary or remuneration than the salary or remuneration to which he would have been entitled if this Act had not been passed."

(3) Sect. 124, sub-s. 1: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896 (in this section referred to as 'the Act of 1896'), have been made is, by virtue of this Act, transferred to the service of any council, then, if the council to whose service he is transferred have no superannuation scheme or if, in the case of an officer transferred to the service of a council who at the appointed day have such a scheme, he gives, within three months after the appointed day, notice in writing to that council

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remain subject to the Act of 1896. From April 1, 1930, until February 26, 1932, the defendants continued to make the weekly deductions of 6*d.* and 1*s.* 6*d.* from the plaintiff's wages. On February 26, 1932, the plaintiff was informed by the defendants that she was not within the superannuation scheme provided by the Act of 1896, and since that date no further deductions were made from her wages and the sum of 10*l.* 19*s.* 3*d.* in respect of the amount of the plaintiff's contributions, together with the interest thereon until the date of repayment, was returned by the defendants to the plaintiff and was received by her under protest. The plaintiff further protested to the defendants and the Ministry of Health, but the defendants refused to treat her as being entitled to the benefit of the superannuation scheme. The plaintiff then brought this action in which she claimed that she was entitled to the scheme, and that the agreements with the West Derby Board of Guardians were binding on the defendants. The defendants did not admit the agreements were binding on them, and they contended that on the construction of s. 124, sub-s. 1, of the Act of 1929 that Act only applied to transferred servants the whole of whose contributions had been paid up under the Act of 1896.

Croom-Johnson K.C. and *H. S. G. Buckmaster* for plaintiff.
Tyldesley Jones K.C. and *H. P. Glover* for defendants.

Farwell J. The plaintiff in this action is a woman of sixty-four years of age who was employed as a cleaner by the West Derby Board of Guardians of the City of Liverpool from the year 1897, and continued to be so employed by them until

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that he elects to remain subject to the provisions of the Act of 1896, that Act shall apply to him subject to such modifications as the Minister may by order direct, and shall continue so to apply to him so long as he is in the service of the council of any county or county borough until, under such statutory provisions as may be made for the superannuation of persons employed by the councils of all counties and county boroughs, there becomes applicable to him a superannuation scheme not less favourable than that provided by paragraph (*a*) of the next following subsection."

the board ceased to exist in 1930. Thereafter she was employed in the same capacity and is still being so employed by the defendants as the successors of the board. The question is whether, in the events which have happened and having regard to the Local Government Act, 1929, the plaintiff has now a right to a pension when she retires, by reason of age, from the service of the defendants.

In my judgment, the question is wholly a question of the true construction of one section of the Act of 1929; but before I deal with that there are certain matters which I must state quite briefly. Under the Poor Law Officers' Superannuation Act of 1896 persons in the position of the plaintiff in this action were entitled to a pension under certain circumstances. By s. 2 of that Act it is provided: "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union or parish who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age, or who shall have attained the age of sixty years and have completed an aggregate service of forty years, or who shall have attained the full age of sixty-five years, shall be entitled on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union, a superannuation allowance according to the scale laid down in this Act." Sect. 3 provides the scale of superannuation allowances and I need not make further reference to that, but s. 12 is a section of some importance. That section provides for contribution by the employee and it is in these terms: [His Lordship read s. 12, and continued:] and in s. 13 the scale of contributions is provided. The effect of s. 12 is to provide that a contribution shall be made by the servant, but the satisfaction of that obligation to contribute is to be by the deduction by the guardians of the appropriate amount from the salary payable to the employee. Sect. 19 is the definition section, and in it "servant" is defined as including "every servant regularly employed at wages by any such authority as aforesaid." Under that Act the plaintiff was entitled

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to a pension at the appropriate time and under the appropriate circumstances, having regard to the provisions of s. 2 of the Act. Also it is plain that it was the duty of the guardians to make the appropriate deduction from the salary or wages which were payable to her. In fact the guardians failed to make any such deduction, with the result that for many years the plaintiff was receiving her wages without any deduction under s. 12 of the Act, but nevertheless being entitled to her pension if and when the right time arrived. She had, in fact, a vested right to her pension, and that I think cannot be doubted, having regard to the case which has been referred to of *Salford Guardians* v. *Dewhurst.* (1) The effect of that decision was that it was not possible or legal for an employee or a union to contract out of the obligations and benefits given by this Act. Consequently, the plaintiff had, so long as this Act was in force, a vested right to her pension notwithstanding that no contribution had been made by reason of the failure of the union to make the necessary deduction. The fact that the deductions had not been made apparently came to the attention of the union in 1929. The plaintiff was then informed that for the future deductions at the rate of 6*d.* per week would be made from her salary. It is pleaded in the statement of claim that the fact that the plaintiff was so informed by the board amounts to an agreement whereby the plaintiff agreed that the deduction should be made. I do not think that Mr. Croom-Johnson, on behalf of the plaintiff, placed much reliance on this plea, and in any case I fail to see how there could have been any such agreement, because all that the board did in fact was to inform the plaintiff that for the future they were going to carry out their statutory duty which they had failed to perform up to that time. How that could amount to an enforçeable agreement which would have any effect whatever as an agreement I wholly fail to understand. That notice given to the plaintiff did not get rid of the difficulty altogether, because, although the board might have made deductions for the future, the fact remained that ever since

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(1) [1926] A. C. 619.

1897, when the lady came into their employment, down to 1929, no deductions had been made at all. That being so, there seems to have been some attempt on the part of the guardians to put the matter right and so far as they could regularise the position, and on March 24, 1930, a letter was written by the deputy clerk to the guardians to the plaintiff in these terms: "Poor Law Officers' Superannuation Act, 1896. Arrears of Contributions. With reference to your application to pay the superannuation contributions in respect of the service for which deductions have not been made, it has not been found practicable at the present stage to ascertain precisely the amount which you would have to pay. You will, however, be informed of the amount as soon as possible. The Guardians have agreed to allow Officers to pay the contributions either in a lump sum or by instalments spread over a reasonable period. In the event of you desiring to pay the arrears, I shall be glad if you will please state your decision below, per return of post, as it is advisable that at least the first instalment should be paid before the 31st instant." Then underneath that there is this: "I desire and hereby agree that the amount due in respect of arrears of superannuation contributions should be deducted from my salary or wages in instalments at the rate of:—1*s.* 6*d.* per week." That is signed by the plaintiff. Then there is a note: "Deductions by instalments of a trivial nature will not be accepted." Then against "Office Held" there is "Office Cleaner" and then the place where the plaintiff was employed together with the date It is significant that that letter was written on March 24 1930, and the desirability of the first instalment being paid before the 31st instant is stressed. I say it is relevant to remember that because, having regard to the Act to which I now propose to refer, the Local Government Act of 1929, the board was about to cease to exist, and that letter or whatever the proper description of it may be was in the nature of a swan song. They were at their last gasp, and this might almost be described as in the nature of a "donatio mortis causa."

I now must refer to some sections of the Act of 1929. That Act by s. 1 provides: "On the appointed day"—(which in fact was April 1, 1930; and I should say that the Act was passed on March 27, 1929, so that from that time persons interested in these matters knew or could have known of its provisions)—"the functions of each poor law authority, shall, subject to the provisions of this Act and except as otherwise expressly provided by this Act, be transferred to the council of the county or county borough comprising the poor law area for which the poor law authority acts, or, if the poor law area is not wholly comprised within one county or county borough, the functions of the poor law authority so far as they relate to any county or county borough into which the area extends shall be transferred to the council thereof, and as from the appointed day all then existing poor law authorities shall cease to exist." The effect of that was, of course, that on April 1, 1930, the West Derby Board of Guardians ceased to exist altogether and their duties and functions were transferred to the defendants in this action. There are many provisions in this Act to which no reference is necessary for the purposes of this case, but I must refer to s. 119, which is the section relating to the transfer of poor law officers. That section provides: [His Lordship read s. 119, and continued:] Then there are provisions with regard to that which I need not read, but s. 121, sub-s. 1, provides: [His Lordship read s. 121, sub-s. 1, and continued:] The result of that, of course, was that the plaintiff in this case became the servant of the defendants instead of the servant of the board of guardians, and she was entitled to receive the same salary or remuneration as she had been receiving hitherto. Then there is s. 124, to which I shall have to make special reference in a moment, because, in my judgment, the whole of this case depends on the true construction of that section; but before reading it I will refer to s. 137, which provides that the enactments mentioned in Sch. 12 of this Act are repealed to the extent therein provided, and when one looks at Sch. 12 of the Act it appears that the Act to which I have already referred, the

Poor Law Officers' Superannuation Act of 1896, is repealed: "Except so far as by virtue of this Act it continues to apply to any transferred officers, and except so far as it applies to officers to whom it applies by virtue of some other enactment, and except section fifteen thereof." The only other part of the Schedules of the Act to which I must refer is in para. 7 of Sch. 9, where there is this provision. It is headed: "Saving for Pending Contracts, Legal Proceedings, Etc.," and it provides, sub-cl. (1.): "All proceedings, legal and other, begun before the appointed day, may be carried on in like manner, as nearly as may be, as if this Act had not been passed." Sub-cl. (2.) provides for the survival of causes of action and then sub-cl. (3.) is in these terms: "All contracts, deeds, bonds, agreements, notices, and other instruments affecting any functions, liabilities, debts, or property transferred by this Act and subsisting at the appointed day, shall be of as full force and effect against or in favour of the council to whom the transfer was made, and may be enforced as fully and effectually as if, instead of the authority named in the instrument, the council to whom the transfer was made had been a party thereto." The remaining relevant section of the Act, s. 124, I will now read. The sidenote is: "Superannuation of transferred poor law officers" and it is in these terms: [His Lordship read s. 124, sub-s. 1, and continued:] It is not necessary for me to read the somewhat lengthy provisions which are contained in the rest of that section, but I should say this, that the plaintiff duly gave notice, in accordance with the provisions of that section, of her election to remain subject to the provisions of the Act of 1896.

The question, and the only real question in this action, is this: having regard to the events which have happened—namely, that the plaintiff has ceased to be the servant of the West Derby Board of Guardians and that her rights under the Act of 1896 have come to an end so far as at any rate that particular body is concerned, because they have ceased to exist, is she now entitled to the pension to which she would have been entitled, to which she had a vested

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right, under the Act of 1896, so long as the board of guardians remained in existence? That is a question which, in my judgment, must depend upon the true construction of s. 124, and it is necessary to bear in mind that the defendants are a statutory body who are dealing with money which is not their own to spend as they please; it is trust money in their hands, and they are bound to apply it in accordance with their duties as provided by the Legislature; and they are not entitled to expend it otherwise, however desirable it might be or however much the failure so to spend it might result in hardship to any particular individual. In the present case if the plaintiff is not entitled to the pension which she claims she no doubt will suffer a real hardship, and no doubt there are many other people in the same position as she is. For a woman in her position, who has been for many many years in the employment of the guardians, who had an absolute right to a pension under the Act of 1896, to be suddenly deprived of that to which she had looked forward and no doubt upon which she depended very largely as a provision for her old age is undoubtedly a great hardship; but neither the defendants in this case nor I have any power to permit money which belongs to the defendants as trustees for purposes defined by the statute to be expended in any other way, however hard it may be that the money cannot be so expended. Whether the plaintiff has or has not a right to a pension must depend upon the true construction of s. 124. When I look at that section, I fail to see how it is possible to put any other construction upon it than that which the defendants invite me to put upon it. The language of the section really is not in doubt: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896, ... have been made"—that is to say, any person who has made the contributions which the Act of 1896 requires is a person who is entitled to a pension under that section; but no one among this class of persons who does not fulfil that description and has not made the contributions required by the Act of 1896 is within this section at all; and there is, so far as I know, no other provision in the Act which would justify the defendant Corporation in making or entitle them to make a payment by way of pension to the plaintiff. It has been said that this portion of the section does not on its true construction mean that all the annual contributions must have been made, that if there have been any contributions then it is enough, and the person who has made some contributions is entitled to the benefit of this section. I should not be sorry in this particular case to feel it possible to put that construction upon the words which the Legislature has used, but for myself I do not feel that it is possible. The Act of 1896 provides, as I have already pointed out, in s. 12 that the officer or servant shall contribute annually for the purposes of this Act a percentage amount of the salary, and then the amount is to be deducted; but it is the duty of the officer to contribute annually; and when one looks at s. 124 of the Act of 1929 and sees that the persons who are to be entitled to the benefit of the pension under the Act are the persons by whom the annual contributions have been made, in my judgment it can only mean those persons who have complied with the provisions of s. 12—that is to say, the persons in respect of whom there have been made the proper deductions from their salaries which s. 12 of the Act of 1896 provides. In the present case it is plain that, apart from the suggested agreement of March, 1930, the annual contributions have not been made by the plaintiff. There has been a deduction of 6*d.* since October, 1929, and since March of 1930 a deduction of 1*s.* 6*d.*; but that the annual payments have been made is, in my judgment, clearly not the case.

In those circumstances, unless there is some other ground on which the plaintiff can bring herself within the language of s. 124, I fail to see how she is entitled to the pension to which she otherwise would have been entitled if this Act of 1929 had never been passed. It is said, first of all, that after April 1, 1930, for a period until February 26, 1932, the defendants did in fact make deductions of 6*d.* and 1*s.* 6*d.* from the plaintiff's salary and that, having made such deductions, they are estopped from saying now that the

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plaintiff is not within s. 124. In my judgment, that contention is not well founded. If the plaintiff is not by virtue of s. 124 entitled to her pension the defendants cannot, by estoppel or by agreement or in any other way, justify the payment out of the funds in their hands of a pension to her.

Then it is said that either or both the arrangements that were carred out in October, 1929, and March, 1930, operates to give the plaintiff the benefit of s. 124. The way it is put is this. It is said that there was an agreement in October under which the 6*d.* deduction was made. As I have already said, I cannot myself see where there was any agreement whatsoever so far as that was concerned. With regard to the transaction in March of 1930 it is said that that amounted to an agreement under which the guardians agreed to accept payment of all the arrears of unpaid contributions by weekly instalments; and that, having agreed to accept payment in that way, the plaintiff must be deemed to have paid up the whole of the contributions from the beginning so that she is qualified under s. 124 as a person by whom the annual contributions have been made.

It is said also that by virtue of para. 7 of Sch. 9 this is an agreement binding upon the defendants which the plaintiff is entitled to enforce. These arguments would have much greater weight if I could persuade myself that the arrangement made on March 27, 1930, was a contract at all; but, as I am quite unable to see where the contract is or, if there was anything in the nature of a contract, what consideration there was for it, the contention is not one which can prevail. I have little doubt that this was a well meaning attempt by the guardians to prevent what may be a hardship on the plaintiff; but I wholly fail to see how it can be said that there is anything in the nature of an enforceable agreement in this arrangement or in the document of March 27, 1930. If the board of guardians had continued in existence, and if thereafter the plaintiff had changed her mind and said: "I do not want these payments to be deducted"—I fail to see how the board of guardians could have sustained an action to enforce this agreement either by way of specific performance or by way of damages for breach of it. In my judgment, this was an arrangement under which for a week there was to be, so far as the board of guardians was concerned, a deduction of 1s. 6*d.*: beyond that it does not amount to anything at all or at any rate to more than an arrangement which could be determined by either side at any time and one which was not binding or legally enforceable in any way.

In these circumstances, in my judgment it is impossible to say that the plaintiff in this case succeeds in bringing herself within that class of poor law officers transferred who alone under the Act of 1929 are entitled to a pension, because she cannot show that she is an officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act of 1896 have been made.

That being so, this action fails and must be dismissed with costs.

P. J. B.

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The plaintiff appealed. The appeal was heard on July 12 and 13, 1934.

C. E. E. Jenkins K.C. and *H. S. G. Buckmaster* for the appellant. It was decided in *Salford Guardians* v. *Dewhurst* (1) that it was impossible to contract out of the poor law officer's right to superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, or the guardians' duty to deduct the proper contribution from the officer's wages or salary. Therefore as between the plaintiff and the West Derby Board of Guardians it was immaterial that deductions had not been made from her wages in accordance with ss. 12 and 13 of that Act, and she remained entitled to the benefit of the Act of 1896 up to the time when the Local Government Act, 1929, was passed putting an end to boards of guardians generally. Sect. 1 of that Act transferred the functions of the guardians, s. 113 transferred their property and liabilities, and s. 119 transferred their poor law officers to the defendants as being the council of the appropriate county borough.

(1) [1926] A. C. 619.

By s. 121, sub-s. 1, every transferred officer was to hold office by the same tenure and on the same conditions, and then s. 124 made provision for the superannuation allowances of transferred officers, while s. 134 defined the expression officer as including servant. Then by s. 137 and the 12th Schedule the Act of 1896 was repealed "except so far as by virtue of this Act it continues to apply to any transferred officers, and except so far as it applies to officers to whom it applies by virtue of some other enactment. . . . ."

The whole difficulty here arises from s. 124, sub-s. 1. The learned judge has taken the view that s. 124, sub-s. 1, is quite plain, and that it only applies to an officer who has made all contributions due under the Act of 1896; but the plaintiff had a vested right to the superannuation allowance under the Act of 1896, and the Act of 1929 ought not to be construed so as to take that vested right away: compare *Butchers' Hide, Skin, & Wool Co.* v. *Seacome.* (1) Reliance is placed on the exception in the 12th Schedule saving the Act of 1896 for certain purposes.

[Lord Hanworth M.R. referred to the Interpretation Act, 1889, s. 38.]

Regard must be had to the general scope of the Act of 1929. Broadly speaking it includes a transfer of officers and servants employed by guardians with all their rights, and s. 124, sub-s. 1, should be read as applying generally to the class transferred and not as excepting individuals who have failed perhaps to pay only one or two of the instalments payable under the Act of 1896. Further the guardians here became alive to the position before the transfer, but instead of suing for the arrears, made an arrangement for their gradual payment to which the plaintiff assented. When regard is had to the rest of the Act, the Court can, it is contended, avoid giving s. 124, sub-s. 1, the very strict construction adopted by Farwell J. and treat the plaintiff as coming within it.

Again reliance is placed on the Interpretation Act, 1889, s. 38, sub-s. 2 (*c*), which provides that when any Act is repealed

(1) [1913] 2 K. B. 401.

then, unless the contrary intention appears, the repeal shall not affect any accrued rights, privileges or liabilities. The liability to pay the plaintiff a superannuation allowance in certain circumstances had arisen before the Act of 1929 was passed, and there is no contrary intention shown. Sect. 124, sub-s. 1, confers rights and is not intended to deprive any one of a vested right. Further when the transfer to the defendants took place, an agreement was in existence between the plaintiff and the guardians for gradual payment of the arrears. That was a contract giving effect to the intention of the Act of 1896 in a particular way, and must have passed so as to bind the defendants.

Lastly, the guardians were, and therefore their successors the defendants are, estopped from saying as against the plaintiff that the contributions were not duly made, as there was a statutory duty to deduct them from the plaintiff's wages. The defendants are really seeking to rely on their predecessors' breach of a statutory duty, and they are estopped from doing so, and after taking over from the guardians are bound to assume that the annual contributions were duly made by way of deduction.

Gover K.C. and *H. P. Glover* for the respondents. The defendants have to deal with public funds, and therefore, however much they may sympathize with the plaintiff and others in her position, they must apply the funds in their hands strictly in accordance with legal rights. If therefore the decision of Farwell J. be right, they cannot depart from the provisions of the Act of 1929 as construed by him.

The only authority dealing with s. 124 of the Act of 1929 is *Pounder* v. *London County Council.* (1) There a hardship was inflicted owing, as Scrutton L.J. said, to a casus omissus. It is contended that there is just such another casus omissus here in the failure to deal with the case of a servant of the guardians who had not made all the contributions due under the superannuation scheme provided in the Act of 1896. It is an omission which the Court cannot supply. Farwell J. was right in holding the language of s. 124, sub-s. 1, to be plain

(1) [1934] 1 K. B. 26.

and to exclude the plaintiff from benefiting after the transfer from the Act of 1896. The words of s. 124, sub-s. 1, are plain and grammatical and contain no ambiguity. No doubt if there was an ambiguity, the Court would give a benevolent construction to the sub-section; but here there is no ambiguity, and the Court would be usurping the task of the Legislature if it gave a modified construction to the sub-section. The *Dewhurst* case (1) really does not assist the plaintiff. It must be assumed that s. 124 was drafted with full knowledge of that decision. The appellant has relied on the Interpretation Act, 1889, s. 38, sub-s. 2 (*c*), but the question is whether any contrary intention has been shown, and it is quite clearly shown by the repealing provision in the 12th Schedule of the Act of 1929 and the limited saving of the Act of 1896 there provided for. The plaintiff is not within that limited saving.

Again the contention that there is an estoppel fails. An estoppel cannot make an act intra vires which is ultra vires: see per Russell J. in *York Corporation* v. *Henry Leetham & Sons, Ld.* (2) If therefore the defendants have no power under the Act of 1929 to pay a superannuation allowance to the plaintiff in accordance with the Act of 1896, no action by them or their predecessors could confer that power.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. It raises an important point and a point made difficult by the complexity of the legislation which has been passed in the wide field of local government—a term which embraces the duties in respect of public health, poor relief, asylums, education and a great number of other matters, in all of which, by reason of the complexity of human affairs, legislation must be intricate.

The question that arises in this case is one in which every one, including the defendants, must have sympathy with the plaintiff. The action is brought by Kate Gissing, a spinster. The facts are not in dispute. We are told in the statement of claim that from about the month of June,

(1) [1926] A. C. 619.

(2) [1924] 1 Ch. 557, 573.

1897, until April 1, 1930, the plaintiff was in the employment of the West Derby Board of Guardians in the City of Liverpool as a cleaner or charwoman, and as such she was subject to the Poor Law Officers' Superannuation Act, 1896, as an officer or servant of the board. It seems that before October 1, 1929, contrary to the provisions of s. 12 of the Act of 1896, no deductions in respect of superannuation contributions were ever made from the plaintiff's wages, and until October 1, 1929, all her wages were paid in full. In or about October, 1929, it was discovered that the Act of 1896 was not being properly carried out, and the plaintiff agreed that the board of guardians should make a deduction of 6*d*. a week, being the appropriate contribution for superannuation benefit under the Act of 1896. Besides that, a further agreement was made for paying the board the deductions which ought to have been made over a long period of time. It would have been quite impossible, of course, to come down suddenly upon a poor charwoman and ask her for the payment of a large number of sums which ought to have been deducted from her weekly wages; and an agreement was made whereby she was to suffer deduction of a further sum of 1*s*. 6*d*. a week in part payment of arrears of contributions for the superannuation benefit. The deduction was made down to March 29, 1930. April 1, 1930, was the appointed day when the Local Government Act, 1929, became operative, and from and after that time the duties and responsibilities of the guardians were transferred to the present defendants, who are the Lord Mayor, Aldermen and Citizens of the City of Liverpool.

After April 1, 1930, and until February 26, 1932, the defendants adhered to the agreements to which I have already referred—namely, for the deduction of the 6*d*. and the 1*s*. 6*d*., and those sums were deducted from the plaintiff's wages. Then on February 26, 1932, she was told that she was not within the superannuation scheme provided by the Act of 1896 and that from and after February 26, 1932, no further deductions from her wages would be made. Then the amount of the deductions already made was calculated, and on that

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basis an account was rendered to her under which she was to be repaid the sums which had been, as the defendants thought at that time, improperly deducted from her wages, and the sum amounted to 10*l.* 19*s.* 3*d.*, there being allowed in that a small sum of 5*s.* 8*d.* for interest. The contributions between October 1, 1929, and February 18, 1932, were 3*l.* 3*s.* 7*d.* and the arrears of contributions paid by the deduction of 1*s.* 6*d.* a week were 7*l.* 10*s.*, and the allowance of 5*s.* 8*d.* for interest brought up the total to 10*l.* 19*s.* 3*d.* That sum was tendered to her by way of repayment in order to put the position right on the basis that the defendants had not been justified in making the deductions or asking for the payments. Miss Gissing was unwilling to receive it: she wanted to go on on the basis of the superannuation allowance; but ultimately she received the sum under protest. She protested that she had rights under the Act of 1896.

Ultimately she brought her action on April 25, 1933. Before that time a certain amount of correspondence had taken place and one or two incidents had occurred to which I must refer. An order had been made in October that deductions were to be made at the rate of 2 per cent. upon their wages from persons who, like the plaintiff, were regularly employed and had been regularly employed by the board of guardians. There was a letter dated March 24, 1930, which recorded the agreement by the plaintiff to pay the 1*s.* 6*d.* a week by way of repayment of the deductions which so far had not been exacted. In June, 1930, the plaintiff expressed her desire to remain under the Act of 1896, and that notice was received by the defendants and accepted on June 30, 1930.

The question therefore arose of what was the position as between the defendants and a person in the situation of Kate Gissing. Correspondence took place, and no doubt the defendants took legal advice, and ultimately, on March 20, 1933, the Town Clerk wrote to Miss Kate Gissing saying: "I am now instructed to say that the corporation are unable to alter the view which they have previously taken of this matter, but that they are prepared to repay the contributions deducted from the wages of Miss Gissing and others, quite apart from the question as to whether such deductions were made under a mistake of fact or law," and, I will add, whether there was any power on the part of the defendants to make a repayment out of the fund to which the payments had been credited—namely, the superannuation fund. That was a fund created under statute and, if the contention of the defendants were right, it became not only a question of a mistake of fact or law, but also whether or not there was any power on their part to make any repayment at all.

As I have said, the action was brought on April 25, 1933, and came for trial before Farwell J., who recognized what has been determined by the House of Lords to be the position under this Act of 1896 in *Salford Guardians* v. *Dewhurst*. (1) It will be remembered that the Act of 1896 sets up a scheme under which there are to be compulsory contributions. The headnote of the case in the House of Lords states: "A compulsory scheme for providing superannuation pensions .... was established by the Poor Law Officers' Superannuation Act, 1896. Obligatory pensions were payable by the guardians and obligatory contributions by the officers and servants. The pensions were expressly made inalienable, but there was no express provision against contracting out." It was held by a majority of the noble Lords present "upon the construction of the Act, that it was not open either to the guardians or to their officers or servants to contract themselves out of the statutory obligations and rights respectively imposed or conferred upon them by the Act." They affirmed the decision which had been given to the same effect in this Court. I will only refer to a passage in Warrington L.J.'s judgment (2): "The plaintiff was for many years an officer or servant of the defendant guardians. In the year 1922, on May 19, he retired from that service by reason of permanent infirmity of body. He thereupon became entitled by virtue of the Poor Law Officers' Superannuation Act, 1896, to receive during his life a superannuation allowance according to the scale provided for by the Act. By that scale the superannuation allowance was to be equal to a

(1) [1926] A. C. 619. (2) [1925] Ch. 655, 667.

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certain proportion of the salary or wages"; and he then comes to the conclusion that whatever might be the volition on either side, the terms of the Act were obligatory on both sides and that the money was to be paid as provided by the Act of 1896.

Farwell J. in his judgment considered that the effect of that case in the Court of Appeal and in the House of Lords was that Kate Gissing under the Act of 1896 was undoubtedly entitled to a pension at the appropriate time and in the appropriate circumstances provided by s. 2 of that Act. Sect. 2 provides: "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union or parish who shall become incapable of discharging the duties of his office with efficiency . . . . or who shall have attained the full age of sixty-five years, shall be entitled on resigning or otherwise ceasing to hold his office or employment, to receive . . . . a superannuation allowance according to the scale laid down in this Act." Farwell J. said that the plaintiff had in fact a vested right to her pension, and he recalled the effect of the decision in the House of Lords: "that it was not possible or legal for an employee or a union to contract out of the obligations and benefits given by this Act. Consequently, the plaintiff had, so long as this Act was in force, a vested right to her pension notwithstanding that no contribution had been made by reason of the failure of the union to make the necessary deduction." We agree with the view so taken by Farwell J.

But then comes this difficulty. Under the Local Government Act, 1929, there was a transfer of the duties, obligations, liabilities and rights of the guardians to the county councils or in the case of the corporation, to the corporation, and it is now said that owing to what is an unfortunate slip in the Act the responsibility which attached to the guardians has not been passed to and does not attach to the present defendants. That this would be a most unfortunate result is agreed on all sides. It seems sad to think that a woman in humble circumstances who has given faithful work over a period of more than thirty years and has been called on during part of that time to make the proper contribution and has not only made that contribution but has acquiesced in a further deduction in respect of the arrears, should, after all that, be suddenly told that owing to a mistake (because it can be nothing else) in the Act of Parliament there is now no power on the part of the defendants to implement the rights which were intended to be given her and in respect of which she had readily consented to play her part. It becomes necessary therefore to look with some care at the Act. Farwell J. said: "Having regard to the events which have happened, namely, that the plaintiff has ceased to be the servant of the West Derby Board of Guardians and that her rights under the Act of 1896 have come to an end so far as at any rate that particular body is concerned, because they have ceased to exist, is she now entitled to the pension to which she would have been entitled, to which she had a vested right, under the Act of 1896, so long as the board of guardians remained in existence? That is a question which, in my judgment, must depend upon the true construction of s. 124." He himself refers to the hardship imposed upon the plaintiff, but he felt himself compelled to hold that by virtue of the terms of s. 124, the defendants could not justify the payment to her of the allowance which they had certainly thought, and she had thought, she was becoming entitled to.

The opening words of s. 124, sub-s. 1, are as follows: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896, ... have been made is, by virtue of this Act, transferred to the service of any council, then, if the council to whose service he is transferred have no superannuation scheme or if, in the case of an officer transferred to the service of a council who at the appointed day have such a scheme, he gives, within three months after the appointed day, notice . . . . that he elects to remain subject to the provisions of the Act of 1896, that Act shall apply to him. . . . ." I turn, therefore, to some other parts of the Act to see whether or not prima facie, without a close examination of its words, this lady is a person to whom that section would apply, and I find in s. 134, the interpretation

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section, " 'officer' includes servant." There is a transfer of the officers under s. 119 which provides: "Subject to the provisions of this Part of this Act, any person who having been on the twelfth day of November, nineteen hundred and twenty-eight, an officer of a poor law authority is at the appointed day an officer of the same or any other poor law authority shall on the appointed day, as respects that office, be transferred . . . ." Inasmuch as " 'officer' includes servant," the servants of the Poor Law Authority in the particular area are transferred under s. 119 to the present defendants. In passing I may observe, although some difficulties might arise about it, that s. 113 says that "Subject to the provisions of this Part of this Act with respect to property and liabilities for which special provision is made, any property and liabilities held or incurred by or on behalf of a poor law authority . . . . shall on the appointed day . . . . be transferred to, and vest in, the council of the county or county borough"; and by s. 134 " 'property' and 'liabilities' have the same meanings as in the Local Government Act, 1888." Turning back over a period of forty years to find therefore what their meaning is, I find "The expression 'property' includes all property, real and personal, and all estates, interests, easements and rights . . . ." —it is very comprehensive—and "The expression 'liabilities' includes liability to any proceeding for enforcing any duty or for punishing the breach of any duty, and includes all debts and liabilities to which any authority are or would but for this Act be liable or subject to, whether accrued due at the date of the transfer or subsequently accruing, and includes any obligation to carry or apply any money to any sinking fund or to any particular purpose."

With these matters in mind, I turn to consider the interpretation of s. 124. The opening words are: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896, ... have been made"; and it is said that in the present case the contributions have not been made because there was a failure to make the proper deductions over a long period of time, and there has only been in respect of that an effort to put the matter right by allowing deductions of a weekly sum of 1*s.* 6*d.* in order gradually to make good the default which had continued over a considerable number of years ; and it is said that we ought to read the words " the annual contributions . . . . have been made " as meaning all the contributions have been made that ought to have been made at the appropriate times over that long period of service. Before coming to a conclusion upon that I should like to call attention to a few more sections in the Act of 1896. That Act established a compulsory system according to the scale there laid down. Under s. 3 the scale for allowances is stated and s. 12 provides that " Every officer . . . . shall contribute annually for the purposes of this Act a percentage amount of his salary or wages and emoluments according to the scale laid down by this Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the common fund of the union." Two or three observations fall to be made as to that. The contribution is estimated year by year ; also the amount is to be contributed or deducted " from time to time." I see no reason why those deductions should be always equal or always made every week ; they are to be deducted " from time to time " and then they are " to be carried to and form part of the common fund of the union." It is the latter words which make me have some doubt whether there was a possibility of the repayment of the sum tendered with interest by the defendants to the plaintiff.

Then we have one provision which suggests that the amount of superannuation allowance may be uncertain, because s. 18 makes the Local Government Board the authority to decide questions, whereas if you think of the Act as one in which the quantum of the contribution is rigidly fixed and to be duly paid at the right moment week by week, and the amount of the superannuation allowance is also fixed, it would seem that by reason of the rigidity of the Act no question would ever arise. A more careful examination of the Act of 1896 makes me think that questions must arise as to the quantum

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of the contribution and the date at which it ought to be or to have been paid, and also as to the quantum of the superannuation allowance ultimately paid by way of benefit. And I think that must be borne in mind when construing the opening words of s. 124: "Where any officer by whom the annual contributions . . . . have been made." Is it to be said that those words involve a rigid compliance with the Act of 1896 so that although there has been by mistake a failure to make deductions during a certain time and an effort to restore the position to what it ought to have been by repayment of money, those words cannot be taken to mean such contributions as in the circumstances have been made but only such contributions as would have been made in strict and rigid compliance with the Act of 1896? I think those words of s. 124 ought to be interpreted so as to bring within the section a case where there has been an effort to comply with the Act of 1896 where the proper contributions have been made so far as possible in view of the mistake made, and contributions as asked for have been paid or acquiesced in by way of deduction.

It appears to me that the learned judge has given too rigid, too severe, an interpretation to those opening words, and that s. 124 does apply to this case, with the result that it is open to the plaintiff to remain under the Act of 1896, and that there is no impediment to her receiving what under the Act of 1896 the House of Lords have determined to be her inalienable and vested right: see *Salford Guardians* v. *Dewhurst.* (1)

I will only add one word more. Without further examination I do not feel ready to decide the point raised by Mr. Jenkins, but I feel there is a great deal of weight to be given to his argument that the repeal of the Poor Law Officers' Superannuation Act, which is effected by the 12th Schedule of the Local Government Act, 1929, does not apply in this case by reason of the exception which deals with the Act of 1896 applying to officers "by virtue of some other enactment." I have not yet been able to examine all the statutes under which officers and servants held their posts under the board of guardians. It seems to me that that exception may have been for the purpose of excepting those persons who held their offices under certain statutes and under a Local Government Board order and were therefore persons to whom the Act of 1896 applied by reason of their holding office under other statutes. If that be so, then there is no contrary intention within the meaning of the Interpretation Act; and then the Interpretation Act, 1889, s. 38, sub-s. 2 (*c*), would assist to preserve the vested right acquired by the plaintiff. I merely make that observation because it might in some circumstances be worth while to pursue it. But for the reasons I have already given I am satisfied that the opening words of s. 124 must be construed in a manner favourable to the plaintiff and not in the manner in which Farwell J. felt constrained to interpret them.

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(1) [1926] A. C. 619.

For these reasons the appeal will be allowed with costs here and below.

Romer L.J. I too have arrived at the conclusion that this appeal must be allowed and I can state my reasons for coming to that conclusion quite shortly, without any disrespect to the learned judge from whom we are differing, because except on one point I find myself in complete accord with the judgment that he delivered. He said in effect that s. 124 did not apply to any officer of whom it could not be said that he had made the annual contributions required by the Poor Law Officers' Superannuation Act, 1896, and I agree with him in so holding. Where I differ from him is in his finding that the plaintiff in this case is not a person of whom that can be said. The learned judge said it was plain that in the case of the plaintiff the annual contributions had not been made. That the annual contributions required by the Act of 1896 have not been made at the time and in the manner contemplated by s. 12 of that Act is no doubt true, but for myself I do not think it is true to say that the plaintiff has not made the contributions required by that Act within the meaning of s. 124 of the Act of 1929.

Payment of the annual contributions prescribed by s. 12 of the Act of 1896 is no doubt a condition precedent to the officer

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or servant becoming entitled to a pension, and the pension will, of course, only be paid on the terms that the pensioner makes good to the fund out of which the pension is paid the sums that ought to have been paid into such fund. It will, however, be sufficient if the payments are in the end made even though they are not made in precise accordance with the terms of s. 12. That appears from *Dewhurst's* case. (1) In those circumstances I cannot see that it was not within the province of the guardians to make arrangements under the Act for payment by the officers and servants of their contributions by other methods and at other times than those contemplated by s. 12. It will be observed that s. 124 of the Act of 1929 does not require that the contributions made necessary by the Act of 1896 shall have been paid in the manner provided by s. 12 of that Act, or contain any words to that effect. All it requires is that the contribution shall in fact have been made.

If I am right so far, it would seem to follow that if the guardians had arranged for convenience between themselves and their servants, or one of them, that instead of deducting a percentage of each weekly instalment of salary or wage the deduction should only be made every fortnight, then when the Act of 1929 came into force on April 1, 1930, it might be that one week's contribution would remain unpaid, but it would be right to say of the particular servant that he had made up to April 1, 1930, all the contributions which ought to have been made by him, having regard to the arrangement come to between himself and the union. In other words, it would be impossible to say of that servant that on April 1 he was in default in respect of any of his payments. In this case, of course, no such arrangement was made, but in March, 1930, there was a considerable sum owing by Miss Gissing to the guardians in respect of arrears of contribution to the fund which they had failed to deduct between the date when she went into their service and a date in October, 1929, when they first began to make the proper deductions, and a question arose as to what was to be done in respect of those arrears.

(1) [1926] A. C. 619.

In those circumstances a letter was written to Miss Gissing, amongst other servants of the union who stood in much the same position as Miss Gissing occupied. The letter, dated March 24, 1930, said: "With reference to your application to pay the superannuation contributions in respect of the service for which deductions have not been made, it has not been found practicable at the present stage to ascertain precisely the amount which you would have to pay. You will, however, be informed of the amount as soon as possible. The guardians have agreed to allow officers to pay the contributions either in a lump sum or by instalments spread over a reasonable period. In the event of you desiring to pay the arrears I shall be glad if you will please state your decision below." Then Miss Gissing signed the document, filling in the sum of 1*s.* 6*d.* per week against this statement: "I desire and hereby agree that the amount due in respect of arrears of superannuation contributions should be deducted from my salary or wages in instalments at the rate of 1*s.* 6*d.* per week." That was accepted apparently by the guardians. In other words, an agreement was come to between the servant and the guardians that contributions in respect of which she was in arrear should be paid in this manner—namely, by a deduction from her wages in the future at the rate of 1*s.* 6*d.* per week. From that time, so long as the contributions of 1*s.* 6*d.* per week were deducted, it was impossible to say that the lady was in default in respect of her contributions to the fund. Whether 1*s.* 6*d.* fell to be deducted before April 1 under that arrangement I do not know. If it did not, it does not matter: if it did, no doubt it was in fact deducted; but on April 1, having regard to the arrangement that had been come to between the union and the plaintiff, an arrangement which, it seems to me, the guardians were perfectly at liberty to come to in relation to the method of payment of contributions to the fund, it is impossible to say that this lady was in default in respect of her contributions. It is therefore impossible to say of her that on April 1, 1930, the annual contributions required by the Act of 1896 had not been made by her. For that reason I agree that this appeal must be allowed.

I desire to say nothing at the present moment, because it does not arise, as to the effect of the Interpretation Act, 1889, or the reference to the Act of 1896 in the 12th Schedule of the Act of 1929 upon the matter that we have been discussing. I prefer to reserve my opinion on both those points until they arise.

Maugham L.J. I am of the same opinion, and as we are differing from the careful judgment of the learned judge in the Court below I wish to state the grounds of my conclusion as shortly as may be.

Miss Kate Gissing, the appellant here, from a date in the year 1897, some thirty-seven years ago, was employed by the West Derby Board of Guardians in the City of Liverpool. Her salary was about 25*s.* per week. From the date of her being so employed—that employment went on until April 1, 1930—one of the conditions of her employment was her right to superannuation allowance under the Poor Law Officers' Superannuation Act, 1896. It is to be assumed that her wage was fixed not without regard to the fact that after a certain number of years' service she was entitled in substance to a pension. It may be observed that the scale of superannuation allowance does not depend on the actual contributions made by the pensioner but on the length of service. The scale is laid down in s. 3 of the Act of 1896. Thus after forty years' service she would be entitled to what is in effect a pension amounting to two-thirds of her wage; so that in her old age she could look forward to a sum of some 16*s.* 8*d.* per week for the rest of her life.

She entered the service of the union after the Act of 1896 had come into force and, therefore, was necessarily bound by it and bound by the system of compulsory contribution of, in her case, 2 per cent. of her wages to be deducted from the payments made to her. There was, however, another class of poor law officer in the employment of the union and of other similar bodies when the Act laying down this system of compulsory contribution came into force, and with regard to those existing officers and servants they were entitled, under s. 15 of the Act, by giving a certain notice in writing, to say that they would not avail themselves of the provisions of the Act. If they gave such a notice they remained subject to the provisions of the preceding Acts—namely, the Poor Law Officers' Superannuation Act, 1864, and certain amending Acts—and retained all the benefits under those preceding schemes. There were therefore in the case of poor law officers when the Local Government Act, 1929, came into force, from the point of view of pension or superannuation allowance two distinct classes, one class of whom had been making contributions under the Act of 1896, while the members of the other class had not been parties to a contributory scheme at all and had made no such contributions. For a considerable time the union in this case did not, as they ought to have done under s. 12 of the Act of 1896, deduct 2 per cent. of the wages of Kate Gissing. Probably they thought the sum so small that it was not worth doing. But after a time their attention was called to this omission (and quite properly called to it, of course), and as from October 1, 1929, the 2 per cent., namely 6*d*., was deducted weekly from her wages. Then it was pointed out by the local authority, I think, that she was in arrear with her contributions, and that was dealt with by an arrangement that as from March 29, 1930, she should have deducted from her wage 1*s*. 6*d*. per week in respect of the arrears, a sum which would slowly go to wipe off the whole of them. That went on until February 26, 1932, and went on although as from April 1, 1930, the Corporation of Liverpool under the provisions of the Local Government Act, 1929, had had transferred to them all the functions, property, and liabilities and the officers of certain unions, including the West Derby Board of Guardians; and the Corporation in complete good faith proceeded to deduct from the wages of Kate Gissing the 6*d*. and the 1*s*. 6*d*. per week.

But doubts were entertained whether, as the result of the Local Government Act, 1929, and in particular of s. 124, Miss Gissing was entitled to any superannuation allowance at all; in other words, whether she had not forfeited her rights as the result of the Act coming into force. The result was that after February 26, 1932, no sum was deducted, and the question arises whether the Corporation ought to have gone on making deductions and whether the plaintiff is entitled as before to the benefit of the provisions for a pension, subject to certain modifications which might be made by the Minister under the Local Government Act, 1929. That question turns on s. 124 of the Act. To my mind the important sections to look at are ss. 113, 119 and 121 of the Act. Sect. 124 is not really setting out, if I may use that phrase, to define the people who, having been poor law officers, will continue to get a superannuation allowance, but is concerned to say that some of those people, at any rate, who by virtue of the Act are transferred to the service of the Council are persons who, if they give a certain notice, or if the Council had previously no superannuation scheme, shall have the Act of 1896 applicable to them subject to such modifications as the Minister may by order direct. In other words, it is a section devoted to showing that the people who were going to get the benefit of the Act of 1896 might yet find themselves subject to modifications which the Minister was to have a power by order (that is to say, not by Act of Parliament) to direct. It begins with the words: " Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896, ... have been made is, by virtue of this Act, transferred to the service of any council "; and, as has been pointed out, the real question is whether the definite article " the " coupled with the words " have been made " does not indicate that the whole of the annual contributions must have been made. In my view, upon the true construction of the Act, that is not a sound contention. I think that the preliminary words of s. 124 are intended to make the distinction which I have already pointed out between those persons who had been making contributions under the Act of 1896 and those persons who under s. 15 of that Act had preferred to remain subject to the provisions of the Act of 1864 and the Acts amending it. I do not start with any strong conviction that the use of the definite word " the " and the tense of the verb " have been made " point to the view that every annual contribution has been made, for the reason that I am satisfied the section is really devoted to an entirely different matter. I agree that prima facie when you say that "the annual contributions have been made" you mean all of them, but that is a meaning which may yield to the context. If you say that the men in a tent are white you do not in every case mean that all of them are white and that there are not one or two sprinkled among them who are not white. It is a question of the context in which the words are found, and here, as I think, there is the strongest possible reason for arriving at the conclusion on the context that the words "the annual contributions" ought to be construed as meaning nothing more than that annual contributions have been made pursuant to the deductions which the employers of the poor law officer ought to have made under s. 12, taking into account any arrangement made between the guardians of the union and any such officer.

The reasons that lead me to that conclusion, as I have said, are I think extraordinarily strong. In the first place, we are dealing with the claims of people like Kate Gissing who have been employed for many years on the terms that they were eventually to get a pension if they did not misbehave themselves. Kate Gissing in fact was over sixty years old when the Act of 1929 came into force; she had practically earned her pension, and the argument would have been equally strong if from ill-health she had to retire immediately after the Act came into force or if she had then in fact attained the age of sixty-five, when she would have been entitled as of right to a pension. My brethren have stated the effect of the decision of the House of Lords in *Salford Guardians* v. *Dewhurst* (1), by virtue of which the plaintiff had a vested right to a pension subject to serving a few more years; and I start with the notion that it is almost incredible that the Legislature can have intended to deprive this woman (or other people in this woman's position) of this right which she had been in the process of earning by service over a long time for no reason at all and

(1) [1926] A. C. 619.

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without any provision in the Act for return to her of her contributions and interest or any other compensation. I start by believing that this is impossible.

The next argument that occurs to me is that there was an inchoate liability imposed upon the defendants in s. 113 of the Act of 1929. The liabilities incurred by or on behalf of the poor law authority are transferred to the Council. It is true that there was not at that moment a complete liability to pay the plaintiff a pension because she had to serve a few more years or to get ill; but when we look at the definition of "liabilities," to which the Master of the Rolls has already referred, in s. 100 of the Local Government Act, 1888, which applies under s. 134 of the Act of 1929, we see that "the expression 'liabilities' includes liability . . . . accrued due at the date of the transfer or subsequent accruing." I find in that fact a very strong argument for thinking that the accruing liability to pay this lady a pension was not destroyed by the casual words introductory to s. 124.

The matter does not stop there, because there are a number of other strange anomalies which would follow if the argument for the respondents were accepted. As I pointed out, those persons who, under s. 15 of the Act of 1896, gave their notice not to come under the scheme have their rights preserved under the preceding legislation in reference to superannuation allowances, and those are expressly preserved to them in the repeal clause which is to be found in the Act of 1929 by a saving of s. 15 of the 1896 Act from being repealed. It follows then, if the argument on behalf of the respondents were right, that those who had never paid any contributions at all under the Act of 1896 but gave notice to remain out of it have their interests and their rights preserved by the Act of 1929, but those who might perhaps for a quarter of a century have submitted to these deductions from their salary or wage would have all their rights taken away from them if it were shown that the contributions had not been made in full—not, be it observed, by any default of their own but by the mistake and default of some governing body. That seems to me sufficiently strong almost to speak for itself.

There is another extraordinary result which would arise

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under s. 124, sub-s. 4, with regard not to poor law officers but to asylums officers. Sub-s. 4 contains in the middle of it the phrase, with regard to such an officer, " if he is an officer by whom the contributions required by the Act of 1896 have been made " (which is the same sentence as that which occasions the difficulty under sub-s. 1, in the same section) then " any service before the appointed day which would have been treated as service for the purposes of the Act of 1896, shall be treated as service for the purposes of the Asylums Officers' Superannuation Act, 1909." Does that mean that he gets the benefit of his previous service only if every contribution required by the Act of 1896 has been made? The result would be that, having served for twenty years and made twenty years' contributions, he would get the benefit of the twenty years' service, but if he had served for twenty-one years and during the first year by some accident the deductions had not been made by the default of the governing body he would forfeit all the benefits derived from a lifetime, or half a lifetime, of service. It seems to me that that again is an anomaly so strong that unless the words are absolutely clear we are driven to the view that s. 124 is not so expressed that we cannot, as a matter of construction, say that the words " the annual contributions . . . . have been made " indicate that they have been made so far as they have been properly exacted or have been made so far as the arrangements between the persons exacting the contribution and the officers or servants require.

For those reasons, in addition to those which have been given by my brethren, I am of opinion that this judgment should be reversed and that we should hold that Kate Gissing has not forfeited her rights to superannuation allowance, and subject to the payment in due course of any contributions which may still be due from her she will be entitled, subject to the provisions of s. 124, to the benefits of the superannuation scheme embodied in the Act of 1896.

Appeal allowed.

Solicitors: *J. M. McDonnell, Jackson & Co.; F. Venn & Co., for Walter Moon, Town Clerk, Liverpool.*

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EVE J.

March 2, 5, 20.

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July 26, 27, 30; *Oct.* 19.

ATTORNEY - GENERAL *v.* RACECOURSE BETTING CONTROL BOARD.

[1933. A. 1839.]

Gaming—Betting—Totalisator—Installation on approved racecourse—Racecourse Betting Control Board—Agreements between Board and agents to procure bets from persons off the course—Bets placed on totalisator—Corporate Powers of Board—Payment of commission to and expenses of agents placing bets—Whether ultra vires the Board—Racecourse Betting Act, 1928 (18 & 19 *Geo.* 5, *c.* 41), *ss.* 1, 2, 3.

The Racecourse Betting Control Board was established as a statutory corporate body with powers to set up and operate totalisators on approved racecourses for the purposes of betting, subject to the conditions required by the Act being observed. In the years 1929 to 1933 inclusive the Board had entered into a series of agreements with two companies, in order to procure the collection of bets from persons not on the racecourse on race-days, and the placing of such bets on the totalisator on the course. The Board agreed to pay commission at certain rates dependent on the amount of money placed by means of such bets, and also the expenses of its agents in collecting and telephoning the bets to the course, such commission and expenses being paid by the Board out of the totalisator fund. The Board also agreed with one of the companies to provide at its own expense all reasonable facilities required by the company for the purpose of its business on the authorized racecourses and to make contributions towards the initial expenses of that company.

In an action brought at the relation of the secretary of a bookmakers' organization, asking for a declaration that such agreements and payments were invalid and ultra vires the Board:—

Held, by the Court of Appeal (1.) that the action of the Board in agreeing to pay the commission and the expenses of providing facilities on the authorized racecourses was reasonably incidental to the power conferred on the Board by the Racecourse Betting Act, 1928, and was therefore not ultra vires. In so doing the Board was only taking steps to increase the bets placed on the totalisators on the courses.

(2.) That in contributing towards the preliminary expenses of one of the companies the Board was acting ultra vires, as it was thereby assisting in the general business of the company which as between itself and its customers was carrying on "off-the-course" betting.

Decision of Eve J. confirmed on the first point but reversed on the second point.

WITNESS ACTION.

The plaintiff, at the relation of Joseph Marshall, secretary of the National Sporting League, brought this action against the Racecourse Betting Control Board, a corporate body established under the Racecourse Betting Act, 1928, Tote Investors, Ld., and the London and Provincial Sporting News Agency (1929) Ld., alleging that the Board, who were authorized to set up and operate totalisators for the purpose of enabling persons to effect betting transactions on certain approved racecourses, had in the years 1929 to 1933, inclusive, entered into a series of agreements with the second and third defendants, the object of which was to procure the placing of bets made by persons off the course by collecting and telephoning the same to the totalisators upon the courses.

The agreement in force between the Board and the above-named News Agency provided that the News Agency would place with the totalisators of the Board and the Board would accept all bets received by the News Agency in respect of which totalisator odds were asked for by its clients, and also all bets received by it from Tote Investors, Ld., and other agents, and that the Board would pay to the News Agency commission on all effective bets placed by it with the Board's totalisators, according to the scale therein set out. Similar agreements were entered into between the Board and the first defendants, Tote Investors, Ld., but in these agreements the Board also agreed that all reasonable facilities required by Tote Investors, Ld., for the proper conduct of its business on the authorized racecourses should be provided at the expense of the Board and also to make contributions towards the initial expenses of Tote Investors, Ld.

The plaintiff alleged that bets had been made with the totalisators by persons not on the course, and commission paid on the amount of such bets, and contended that the making of the payments by way of commission and otherwise to the second and third defendants under the said agreements was ultra vires the Board, which was not authorized under the above Act to apply any moneys under their control in making any such payments and that such payments were not working expenses.

The plaintiff claimed a declaration that the Board was acting ultra vires in making such payments as aforesaid

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to the second and third defendants, and an injunction in the terms of the declaration.

The defendants denied the allegations of the statement of claim, and in particular that any payments made by them were ultra vires on any ground or were not authorized by the Act. They alleged that the payments complained of by the plaintiff were working expenses of operating the totalisators, and that it was impracticable to operate them if the betting on race days was to be confined to bets placed by persons actually on the course. Evidence to that effect was given.

Further details of the agreements complained of will be found in the learned judge's judgment.

Gilbert Beyfus K.C. and *Cyril Radcliffe* for the plaintiff. The defendant Board are paying commission to the other two defendants for transmitting information as to odds and for collecting bets from persons not on the racecourse during the time of races, and we submit that this is beyond their powers. In effect they are operating a totalisator off the racecourse, which they have no power to do. In order to see what those powers are it is necessary to examine the previous law which is contained in the Betting Act, 1853, and various decisions thereon. See especially *Powell* v. *Kempton Park Racecourse Co.* (1), where the House of Lords held that an inclosure, known as Tattersall's Inclosure, on the course resorted to by a large number of bookmakers, was not a " place, opened, used or kept " for purposes prohibited by the Act. In *Brown* v. *Patch* (2) the Queen's Bench Division held that any localization by a bookmaker of a place on the course, even to the extent of standing on a box under an umbrella, was prohibited by the Act. The result of these cases was that it was impossible to make any special charge for bookmakers in Tattersall's Ring until it was permitted by the Racecourse Betting Act, 1928. [*Attorney-General* v. *Luncheon and Sports Club, Ld.* (3) ; *Streatham Cinema, Ld.* v. *John McLauchlan, Ld.* (4) ; *Shuttleworth* v. *Leeds Greyhound Association, Ld.* (5) ;

(1) [1899] A. C. 143.
(2) [1899] 1 Q. B. 892.
(3) [1929] A. C. 400.
(4) [1933] 2 K. B. 331.
(5) [1933] 1 K. B. 400.

Tollett v. *Thomas* (1); and *Everett* v. *Shand* (2) were referred to, also the Interim and Final Reports of the Royal Commission on Lotteries and Betting (1933).]

The Act was passed with the definite and limited purpose of giving the public facilities for betting, either through the totalisator or through bookmakers, but on racecourses only. The relator's complaint is that the defendants have extended their functions so as to give persons all over England and Scotland facilities for betting with the totalisator, although they may not come within a hundred miles of the racecourse. The effect of the agreements which have been entered into with the defendants, is that certain favoured persons, i.e. the defendants, are allowed to place bets on the totalisator on better terms than any others. The commission payable to the defendants is taken out of the 10 per cent. deduction from the pool allowed for working expenses, but it is not working expenses within the Act. There is nothing to prevent any one, including the defendants, from telephoning down bets to the racecourse; all that the plaintiff says is that the defendant Board must not pay the cost of so doing. If this is within their powers, why should they be confined to operating a tote on the racecourse?

General words in a statute must be so construed so as to fit in with the general intent: *Viscountess Rhondda's Claim.* (3) The Court should consider the cause and necessity which led to the Act being passed: before then it was impossible to set up a totalisator on a racecourse to operate for cash, and it was impossible to charge a higher admission to bookmakers or to make any kind of profit out of betting.

Gavin Simonds K.C. and *Wilfrid Hunt* for the defendants, the Racecourse Betting Board. The single question raised in this action is whether what the Board has done and claims the right to do is incidental to or consequential upon what is authorized by this Act. The effect of this is discussed in *Attorney-General* v. *Great Eastern Ry. Co.* (4) We submit that it is so incidental and consequential.

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(1) (1871) L. R. 6 Q. B. 514.
(2) [1931] 2 K. B. 522.
(3) [1922] 2 A. C. 339, 369.
(4) (1880) 5 App. Cas. 473, 478.

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We accept the summary of the previous law given by Mr. Beyfus as correct. There is no doubt or obscurity as to the effect of the Act in altering the law.

The Act authorizes the establishment of a racecourse and the operation of a totalisator upon it offering new facilities for betting to any persons who wish to bet, recognizing that there is a legitimate public demand for that kind of betting. It cannot still be said that it is contrary to public policy to encourage betting in any form.

A new kind of betting, open equally to persons on the racecourse and persons who are not there, is legalized by the Act. The question of public policy has nothing to do with the case. It is only necessary to read s. 1, sub-ss. 1 and 2, of the Act. It is not denied that bets can be placed with the totalisator by agents of persons not on the course ; all that is said is that the Board has no right to pay agent's commission on bets collected by them. If it is part of the Board's business to accept bets from backers off the course, why are they not entitled to pay the agents who bring the business ?

The Act obviously intends that the totalisator should be worked at a profit, so as to secure contributions for the benefit of charity and the advancement of horse breeding, and it has been shown that it is impossible to operate it at a profit unless bets from off the course are collected.

Under s. 3, sub-s. 6, there is power to pay working expenses, and under sub-s. 7 the Board has power to do all things which are incidental to the business. See on this point *Deuchar* v. *Gas Light & Coke Co.* (1) ; *Attorney-General* v. *Great Eastern Ry. Co.* (2) ; *Attorney-General* v. *Manchester Corporation* (3) ; *Attorney-General* v. *Smethwick Corporation* (4) ; *Taunton* v. *Royal Insurance Co.* (5) From one point of view Tote Investors, Ld., may be regarded as a backer, but that company put the money they do on the totalisator because they have entered into an agreement with the Board to do certain acts and to incur certain responsibilities.

(1) [1925] A. C. 691, 695.
(2) 5 App. Cas. 473, 478, 481.
(3) [1906] 1 Ch. 643, 655.
(4) [1932] 1 Ch. 562, 577.
(5) (1864) 2 H. & M. 135, 138.

F. R. Evershed K.C. and *A. Andrewes-Uthwatt* for the defendants, Tote Investors, Ld., and London and Provincial Sporting News Agency (1929) Ld., referred to *Viscountess Rhondda's Claim* (1) and *Vacher & Sons, Ld.* v. *London Society of Compositors.* (2)

Beyfus K.C. replied.

Cur. adv. vult.

March 20. EVE J. The relator in this case is the secretary of the National Sporting League. The defendant Board are a body corporate, consisting of a chairman and eleven other members, established as a Racecourse Betting Control Board for the purposes of the Racecourse Betting Act, 1928. The action has been brought to impeach the validity of certain agreements entered into between the Board and their co-defendants, having for their object the transmission to the totalisators operated by the Board of a considerable volume of betting which, in the absence of such agreements, would have reached other destinations more satisfactory, I gather, from the point of view of the members of the National Sporting League.

Betting on horse-racing falls under one or other of two heads: It may be effected in cash on the course, in which case it is spoken of as "on the course" betting, or it may be transacted away from the course with commission agents who conduct their business on a credit basis with known clients and settle bets by the official starting price made on the racecourse. This type of betting is known as "starting price" or "off the course" betting, and its volume preponderates largely over "on the course" betting.

The relator's claim to the relief he seeks is founded upon the submission that the Act of 1928 is limited in its operation to "on the course" betting, and does not contemplate or authorize the use of the totalisators established thereunder for any betting of the "off the course" type.

For the defendants it has been argued that the express statutory authority to set up and keep totalisators and to operate them for the purpose of effecting betting transactions, carries with it, as ancillary to the exercise of the statutory powers, an implied authority to do whatever may be fairly regarded as incidental to or consequential upon the Board's statutory powers, and that the matters complained of by the relator are of this nature and give rise to no cause of action.

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(1) [1922] 2 A. C. 339, 365.

(2) [1913] A. C. 107, 117.

In order to decide which of these two arguments is to prevail, three questions have to be considered : first, what are the statutory powers of the Board ; secondly, what is the course of conduct complained of ; and thirdly, does that conduct transgress the limits of the Board's express or implied powers ?

The Act is described as one to amend the Betting Act of 1853, to legalize the use of totalisators on certain racecourses, and to make further provision with regard to betting thereon. It empowers the Board, notwithstanding any rule of law or enactment to the contrary, to set up, or authorize any person to set up and keep, a totalisator on any approved racecourse, and to operate the same in accordance with the provisions of the Act, and for the purpose of effecting betting transactions on horse races only on days when horse races but no other races take place on the racecourse ; any person may effect betting transactions by means of a totalisator lawfully operated, and nothing contained in the Betting Act of 1853 is to apply to any approved racecourse or any act done thereon on the days on which horse races but no other races take place thereon. And after declaring, for the purposes of the Act, that the expression " totalisator " means the contrivance for betting known as the totalisator or pari mutuel, or any other machine or instrument for betting of a like nature, whether mechanically operated or not, and that the expression " approved racecourse " means any ground used for the purpose of a racecourse for racing with horses, and any ground adjacent thereto in respect of which ground or adjacent ground there is in force a certificate of approval issued under the Act.

Sect. 2 establishes the Board as a body corporate with power to acquire and hold such land on or adjacent to a racecourse as may be reasonably required for the purpose of operating a totalisator thereon and for the offices of the Board, and by s. 3 the Board may, for the purposes of the Act, issue (subject to such conditions as they may impose) and at any time revoke, certificates of approval in respect of racecourses and ground adjacent thereto; they may also, for the purposes of the Act, borrow money upon the security of the totalisator fund hereinafter mentioned, or otherwise, and may lend money for the purpose of setting up or operating totalisators in accordance with the provisions of the Act, and may do all such things as are incidental to the matters I have already mentioned, and to certain obligations or duties imposed upon them.

These obligations are: (1.) To make it a condition of the granting of a certificate of approval of any racecourse, that the persons having the management of such a racecourse do provide a place, whether in a building or not, where bookmakers may carry on their business and to which the public may resort for the purpose of betting, and that the charge to a bookmaker or any assistant accompanying him to an enclosure on the racecourse for the purpose of the bookmaker's business shall not exceed the limits therein mentioned. (2.) To distribute or cause to be distributed the whole of the money staked by means of a totalisator on any race among the persons making bets by means of the totalisator on that race after deducting or causing to be deducted such percentage—usually 10 per cent.—of such moneys as the Board may from time to time determine either generally or with respect to any particular racecourse. (3.) To establish a fund known as the Totalisator Fund into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator and any other moneys received by the Board. (4.) (Subject to the payment out of the Totalisator Fund of all taxes, rates, charges and working expenses, and to the payment out of the said Fund of such sums as they think fit to meet contingencies, and to the payment out of the said Fund of such sums as they think fit to apply to charitable purposes) to apply the moneys from time to time comprised in the Totalisator Fund in accordance with the scheme prepared by the Board and approved by the

Home Secretary for purposes conducive to the improvement of breeds of horses or to the sport of horse-racing. Finally, they are to submit annually to the Home Secretary a report of their proceedings together with an account of the moneys received and expended by them during the year, and such report and account are to be laid by the Home Secretary before both Houses of Parliament.

Such are the provisions of the Act which the Board are called upon to administer. They are directed to affording to frequenters of approved racecourses and others (for there is nothing in the Act requiring the personal attendance of the bettor ; he may engage any one who contemplates being on the course to execute his commission) new and attractive facilities for betting, and the Legislature has thereby legalized a system of betting by means of a new method and, by the same statute, has provided for the material comfort of the bookmaker, with whose business the new method is brought into active competition.

I am not overlooking the pious uses to which the ultimate profits, if any, of this betting business are dedicated, but no one would, I suppose, suggest that the Act could accurately be cited as one for purposes conducive to the improvement of breeds of horses. The presence of this somewhat remote remainder may afford consolation to the consciences of some, but it cannot, in my opinion, make this Act other than one to legalize betting on approved racecourses by means of the totalisator. It is quite true that the Act deals with the racecourse only, but inasmuch as the betting facilities the use of which it legalizes can only be enjoyed on the racecourse, this restriction would seem to be inevitable. It says, in substance : " Here is a new device for betting. It can be lawfully used on these approved racecourses only, and if you want to use it you must go there to find it " ; but the installation, maintenance, and working of the totalisator involves a large expenditure ; the days upon which it can be operated are not numerous, and in bad weather the attendance at race meetings is disappointingly small.

In these circumstances, the Board must do what they can to increase the number of those who attend the meetings and resort to the totalisator for betting, and it is not suggested that it would be beyond their statutory powers to take such steps as they might deem proper to attract customers to their racecourses and the totalisators being operated thereon. But even so, experience has demonstrated that the volume of " on-the-course betting " is never likely to produce a satisfactory result if restricted to backers actually present in person unless augmented by a large proportion of the existing " off-the-course betting," the totalisators being the medium by which that contribution should be obtained.

The question how this object could be attained was one which presented considerable difficulty, having regard to the fact that betting with the totalisator must take place on the racecourse, and for cash or the equivalent of cash. It was finally solved by making available for totalisator bets the services of certain agencies established for two main purposes, one for the rapid transmission to starting-price bookmakers in various parts of the country of information relating to the fluctuation of prices on the racecourse, and the other for the laying-off of bets as between the bookmakers on the racecourse and the starting-price commission agents. The information and bets were transmitted between the racecourse and the starting-price offices by direct private telephone lines radiating from a central office in London to provincial towns, and in each case to a house or position in close proximity to the racecourse, and this already established method of communication the Board decided to make available for totalisator bets, as for the bets laid off with bookmakers on the racecourse.

Hence the series of agreements to which exception is taken in paras. 8 to 12 inclusive of the amended statement of claim. The first series, extending from July, 1929, to April 12, 1933, are agreements come to between the Board and the defendants The London and Provincial Sporting News Agency (1929) Ld., whereby, after recitals to the effect that the Board was engaged in setting up and operating totalisators for betting on racecourses in Great Britain, and was prepared to arrange facilities for the use of persons not on the course during race meetings, and that the company was carrying on a "blower" service for supplying betting information from racecourses for bookmakers not on the course, and for laying off the bets of such bookmakers on the course during race meetings, it was agreed that the company should place with the totalisators of the Board where such totalisators were operating on courses where the company's telephones were installed, and that the Board would accept, all bets received by the company in respect of which totalisator odds were asked for by its clients, and such other bets received by the company as it might deem it advisable in its interests to place with the totalisators of the Board ; and the Board agreed to pay to the company commissions on all effective bets placed by it with the totalisators of the Board, according to the scale therein set out ; and the Board further agreed to use their best endeavours to arrange for the installation of the company's telephones in the Board's buildings at racecourses where their totalisators were in operation, for the transmission of bets to such totalisators, but the expense in connection with any such installation and use, and charges for rentals and calls, was to be paid by the company.

By the second series of agreements, three in number, concluded between the Board and the defendants Tote Investors, Ld., similar arrangements were made for the transmission of bets to the totalisators of the Board by the company, and for the payment to the company of a commission on the amount of all effective bets placed by the company on the totalisators of the Board ; and under these particular agreements the Board have from time to time contributed sums in addition to such commission towards the expenses of the said Tote Investors, Ld.

The plaintiff contends that all these agreements are ultra vires, and claims a declaration that the Board has no power to make any contributions towards the expenses of Tote Investors, Ld., or to pay the defendants, or either of them, out of the totalisator fund constituted by the Act, or out of any other moneys under the control of the Board, any commission, remuneration, or other sums of money in consideration of the companies, or either of them, placing bets, whether on behalf of themselves or other persons, upon the totalisators operated by the Board.

It has been argued in support of the claim to this declaration that the Act is concerned with the racecourse, and that alone; that the powers and duties of the Board are restricted to the control of the racecourse and the betting on the part of backers on the course by means of their totalisators; and that there is nothing in the Act which contemplates, still less authorizes, a gathering together of bets collected from all over the Kingdom and brought to the Board's totalisators by agents whose industry is rewarded by a commission regulated by the amount of their recurring contributions. That there is much to be said in support of this argument cannot be doubted by those who have heard what counsel for the plaintiff had to say.

But no attempt has been made to point out any provision in the Act which the Board's procedure can be said to have disregarded. The arguments advanced by the plaintiff tend to raise in my mind a suspicion that his objection is not altogether unconnected with the competition to which the Board's activities have given rise; but whether this be so or not, the plaintiff, in my opinion, has not discharged the onus which lies upon him of establishing that the acts complained of are outside the competency of the Board, for, after all, the Act is an enabling one, by which it was intended, subject to express reservations and conditions, to legalize this particular mode of betting for the purpose of gain and resulting profits. The Board has been entrusted with the responsibility of examining and ultimately deciding the means by which these objects can best be attained, and, in my opinion, the means hitherto adopted do not transgress the corporate powers of the Board.

The action therefore fails, and must be dismissed.

H. L. L.

C. A.

The plaintiff appealed. The appeal was heard on July 26, 27 and 30, 1934, and judgment given on October 19, 1934.

Sir Stafford Cripps K.C., *Gilbert Beyfus K.C.* and *Cyril Radcliffe* for the appellants.

Gavin Simonds K.C. and *Wilfrid Hunt* for the Racecourse Betting Control Board.

Evershed K.C. and *Andrewes-Uthwatt* for the other defendants.

The following additional cases were cited: *Small* v. *Smith* (1), *Dundee Harbour Trustees* v. *D. & J. Nicol* (2), *Attorney-General* v. *Mersey Ry. Co.* (3), *Attorney-General* v. *Leeds Corporation.* (4)

Cur. adv. vult.

Oct. 19. LORD HANWORTH M.R. This action is brought by His Majesty's Attorney-General at the relation of Joseph Marshall, who is the Secretary of the National Sporting League, and the plaintiff claims that the defendant Board, hereinafter referred to as "the Board," are acting ultra vires in paying, or agreeing to pay, to either of the other defendants, out of moneys under the control of the Board, any commission, remuneration or other sums of money in consideration of the other defendants, or either of them, placing bets, whether on behalf of themselves or other persons, upon totalisators kept and operated by the Board, or agreeing to pay, or paying, to the defendants, the Tote Investors, Ld., any contribution towards the expenses of such defendants, whether for consideration or not: and for an injunction by way of consequential relief to make the declaration effective.

The Board admit that they have made payments by way of commission to the other defendants under agreements which are referred to in the defence and must be further considered; but they contend that their action in so doing is not ultra vires.

The Board were constituted under the Racecourse Betting Act of 1928 (18 & 19 Geo. 5, c. 41), whereby they were given powers to set up, keep and operate totalisators upon racecourses. They have entered into agreements, severally, with the other two defendants—and paid moneys to them by way of commission, and to the second defendants as a contribution to their expenses—the general purpose of which is to enlarge the scheme of betting which comes to the totalisator under the charge of the Board. The point to be decided is whether such action is within the Board's powers.

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(1) (1884) 10 App. Cas. 119.
(2) [1915] A. C. 550.
(3) [1907] A. C. 415.
(4) [1929] 2 Ch. 291.

The Board is constituted under the Act with power to set up and keep a totalisator, a term to which an interpretation has been agreed between the parties extracted from the Report of the Royal Commission on Lotteries and Betting, Command 4341, para. 112, upon racecourses which the Board have approved by issuing a certificate of approval under s. 3, sub-s. 1.

Upon such racecourses so approved: (*a*) the Betting Act, 1853 (16 & 17 Vict. c. 119), has no force or application; (*b*) the Board and persons authorized by them may operate the totalisator for the purpose of effecting betting transactions on horse races only; (*c*) it is lawful for any persons to effect betting transactions by means of a totalisator lawfully operated.

By s. 3 the Board are empowered: (*a*) to distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets, made by means of the totalisator, on that race after deducting such percentage of those moneys as the Board may from time to time determine. This deduction in fact has been fixed at 10 per cent. (*b*) To establish a fund into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the Board; (*c*).to do all such things as are incidental to the previous powers with which the Board is charged and entrusted.

There have been a number of agreements made successively by the Board with the other defendants. The effective agreement with the third defendants, the London & Provincial Sporting News Agency (1929), Ld.—referred to in the case, for short, as "the Blower company"—is dated April 12, 1933, and under it, quite shortly put, the Board agree to accept all bets received by the Blower company in respect of which

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totalisator odds are asked for by the clients of the company and such other bets as the company may deem it advisable to place with the totalisators of the Board. The Board, on their part, agree to pay to the Blower company a commission on all effective bets placed by the Blower company with the Board's totalisators in accordance with an agreed scale.

The effective agreement with the defendants, the Tote Investors, Ld., is dated January 19, 1931, with a memorandum of agreement endorsed upon it and dated April 14, 1931, together with a supplemental agreement dated June 27, 1932. Under the terms of these agreements the Tote company agree to transmit " by such channel or medium " as may be approved —in effect the Blower company—all bets received and accepted by the company from its clients, and the Board agree to accept such bets and to pay the Tote company a commission on the amount of all effective bets placed by the company with the Board's totalisators in accordance with an agreed scale, and in certain events to contribute to the expenses of the Tote company.

There were other provisions in the agreements whereby the Tote company agreed to conduct a racecourse credit service in accordance with procedure approved by the Board. The Tote company was not to hold itself out as the agent of the Board, but one of the purposes of the agreements, plainly, was to stimulate the activities of the Tote company to secure clients whose wagers were to be transmitted to the defendant Board's totalisators, and thereby enlarge the volume of the business done by the totalisators. This purpose was illustrated by the production of an advertisement or circular issued by the Tote company which encouraged backers to resort to the company, and stated : " By arrangement with the Racecourse Betting Control Board established by Act of Parliament, this company offers facilities for betting on credit with the official Racecourse totalisators. Our service is available to all responsible persons both on the racecourse, and by letter, telegram, or telephone, to any one of our 18 offices."

The objection of the plaintiff on behalf of the National

Sporting League—a body largely composed of bookmakers—is that these outside activities ought not to be encouraged, and assisted by the Board, through payment of commissions and otherwise out of the fund which the 10 per cent. deduction leaves in the hands of the Board.

In other words, while it is accepted that the Board are empowered to arrange for " on the course " betting by means of the totalisators, it is contended that it is ultra vires for them to arrange for, or to increase the volume of their business from, what may be termed " off the course betting."

There was evidence given at the trial that unless the volume of business was increased beyond what is available and takes place on the racecourses where totalisators are installed, it would not be possible for the Board to maintain and operate them. The expenses involved were too great to be defrayed out of " on the course " betting alone, and so, as the Chairman of the Board stated, they " wished to divert as much away-betting from the bookmakers to our own totalisators as we possibly can." He admitted that the Board had contributed to some of the cost of the advertising done by the Tote company, and also to their expenses.

The principles on which the doctrine of ultra vires is to be maintained are not in doubt. They have been explained in many cases, of which *Ashbury Ry., etc., Co.* v. *Riche* (1) is the locus classicus. Lord Watson, in *Baroness Wenlock* v. *River Dee Co.* (2), states the principle of that case and of *Attorney-General* v. *Great Eastern Ry. Co.* (3), as follows : " Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."

In *Deuchar* v. *Gas Light & Coke Co.* (4), an attempt was

(1) (1875) L. R. 7 H. L. 653.
(2) (1885) 10 App. Cas. 354, 362.
(3) 5 App. Cas. 473.
(4) [1924] 2 Ch. 426, 431.

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made to collect instances where this principle has been applied, and the activity that has been questioned held to be on one side of the line or the other.

It is also to be borne in mind that Lord Selborne, in *Attorney-General* v. *Great Eastern Ry. Co.* (1), said that he was in agreement with James L.J. "that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

A number of decisions can be found establishing that statutory powers cannot be used to enlarge powers of one sort into a different field of activity, although it may be convenient so to combine them. Thus, the London County Council (in *London County Council* v. *Attorney-General* (2)), which possessed statutory powers to work tramways, was restrained from running omnibuses, also, as auxiliary to the tramways—the two businesses being separate and distinct—the omnibuses not being "incidental" to the tramways. See also *Attorney-General* v. *Mersey Ry. Co.* (3), where a railway company, who had no statutory powers therefor, were restrained from running omnibuses. So, too, in *Dundee Harbour Trustees* v. *D. & J. Nicol* (4), the former, who held a franchise of ferry within defined limits, were restrained from using their steamers at times when they were not required to run on the ferry, for excursion trips beyond the ferry limits. But a corporation empowered to work tramways were held competent to run a parcels delivery business so long as it was confined to parcels or goods carried, or to be carried, on the tramways, but not to run a general parcels delivery business apart from their tramways. (See *Attorney-General* v. *Manchester Corporation.* (5))

In the light given by these decisions, are the activities of the Board that are complained of incidental to their statutory powers and duties reasonably interpreted and considered?

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(1) 5 App. Cas. 473, 478.
(2) [1902] A. C. 165.
(3) [1907] A. C. 415.
(4) [1915] A. C. 550.
(5) [1906] 1 Ch. 643.

The appellants drew attention to the distinction, which has often been drawn because of the terms of the Betting Act of 1853, between " on the course " and " off the course " betting, and contended that the powers given to the Board by the Act of 1928 removed any illegality from " on the course " betting, while leaving the distinction of that kind of betting from " off the course " betting still standing and effective. They argue that no reasonable interpretation should be allowed in favour of the Board in respect of " off the course " betting, which it was their avowed purpose to encourage, to collect into their own channels, and to carry into effect.

These distinctions of " on the course " and " off the course " betting are well known, but there is no indication in the Act which set up the Board, and entrusted them with the duty of keeping and operating totalisators, that this distinction is to be maintained. It is true that, upon a racecourse approved by the Board for a totalisator, the Betting Act of 1853 has no force or application. This was necessary in view of decisions given under the Act ; but it is noticeable that the Betting Act of 1853 is not otherwise referred to, nor is it expressed that, except for the purpose of removing the bar as to a " place " on the course, the Betting Act is to prevail in reference to betting done by means of the totalisator.

It is necessary to bear in mind that the Board was entrusted and charged with power to set up, keep, and operate totalisators, and to do all such things as are incidental to these powers. (See s. 3 (*c*).)

Why was the Act passed ? It was to enable the Board and any person authorized by them to set up and keep a totalisator. Sect. 1, sub-s. 2, of the Act in effect provides that notwithstanding any rule of law or enactment to the contrary, it shall be lawful on any racecourse approved by the Board for the Board and any person authorized by them to set up and keep for the purpose of effecting betting transactions, on horse races only, a totalisator on certain days specified therein.

What is the merit of a totalisator ? This question can be answered by looking at the definition of a totalisator which has been wisely accepted by all parties to this case. It states that "the essential features of pari-mutuel or totalisator betting is that the odds are determined on the conclusion of the betting by the total amount of money staked on the several horses by their backers." Subject to the deduction of the 10 per cent. paid to the owners or operators of the totalisator, all the money staked on the several horses is divided equally to the holders of the winning tickets. There is thus a fair distribution of the winnings upon a bet that proves successful, less only the 10 per cent.

The use of the totalisator is confined to horse racing and to certain days of racing. It is not easy to appreciate why bets that are staked upon horses running in the races on these specified days, whether staked before the day of the race or elsewhere from the course, but nevertheless in respect of the horses and races to be run on that day and on that racecourse, should be treated as outside and different from money staked by those actually on the course and be deprived of the advantages which the totalisator is designed to, and does, afford. When the Court has to consider what things are incidental to the other powers of the Board, the distinction drawn from the provisions of the Betting Act of 1853 seems artificial, and particularly when the powers derived by implication from the provisions of the Act are "to be reasonably and not unreasonably understood and applied."

So far as the test of what is reasonable is a question of fact, the evidence that the totalisators could not be maintained and operated if the volume of business was restricted to what is available on the course on the days when it is operated, must not be overlooked. It is cogent to prove that the bets accepted outside the course are ancillary to the working of the totalisators and are of the same nature as those to which no exception is taken by the plaintiffs herein.

For these reasons I have come to the conclusion that the main objection taken by the relator to the proceedings of the Board cannot be sustained.

Two subsidiary points were, however, taken in the statement of claim and urged by the appellant's counsel, chiefly in his reply. They are that, even if the exercise of the Board's powers complained of, is declared to be intra vires and the commission paid to the defendants, Tote Investors, Ld., justifiable, yet that there are other payments made by the Board which must be held to be ultra vires. These are: (1.) The sums paid to the defendants, Tote Investors, Ld., under the latter part of cl. 7 of the agreement dated January 19, 1931, under which the Board agree that all reasonable facilities required by the company for the proper conduct of its business on the authorized racecourses, including accommodation, fittings, fixtures and furnishings required for such service, so far as is found to be possible in agreement with the racecourse owners, shall be provided at the cost of the Board, who are to be responsible for the maintenance of the same; and (2.) that under the memorandum of agreement dated April 14, 1931, the Board, over and above the commission payable, should make a further special contribution towards the initial expenses of the Tote Investors, Ld., up to the beginning of the flat racing season in the year 1932 which was continued, by the agreement of June 27, 1932, until the flat racing season in 1933, and so on in each year.

The first of these outlays that are objected to appears to fall into line with the commission paid to Tote Investors, Ld., for the purpose of increasing the volume of the bets which are passed on to the totalisators under the control of the Board.

If the view I have expressed is right, that the Board can, by way of a commission, secure a larger quantum of betting being placed on their totalisators, there seems no objection to their facilitating the conduct of the business by contributions to the company for the proper and more easy conduct of the collection of bets which in due course find their way to the totalisator.

The second series of payments objected to is of a different nature and quality. Such payments seem to be made otherwise than in relation to the bets which are brought on to the totalisators on the racecourses and are added to the legitimate business of the Board. They appear to be independent payments made to start and support Tote Investors, Ld.

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—to enable that company and its shareholders to be relieved, pro tanto, of expenses which naturally belong to and ought to fall upon them. Such a contribution appears to lie outside any reasonable interpretation of the Board's own activities and powers, and accordingly must be declared to be ultra vires, and an appropriate declaration made in respect of them. To that extent we will alter the order made by Eve J.

ROMER L.J. The question to be determined on this appeal is whether it is ultra vires the defendant Board for them to pay to the other defendants or either of them commission or other reward in consideration of such defendants or either of them placing bets upon totalisators kept and operated by the defendant Board, or to pay to the defendants, Tote Investors, Ld., contributions towards the expenses of such defendants.

There is no dispute between the parties, nor could there be, as to the law to be applied to the consideration of this question. The relevant authorities have already been referred to in the judgment of the Master of the Rolls, which I have had the privilege of reading, and it is unnecessary to deal with them further. It is sufficient to say that the test to be applied is whether the acts in question of the Board, which are nowhere expressly prohibited, can fairly be regarded as incidental to or consequential upon the exercise of the powers that the Legislature has in express terms conferred upon the Board. In these circumstances the first thing to be ascertained is what those powers are. Here again there is no room for dispute. They are to be found expressed in unambiguous terms in the Racecourse Betting Act, 1928. By s. 1, sub-s. 2, the Board is given power (amongst other things) to set up and keep a totalisator on any approved racecourse (as defined in sub-s. 3), and there to operate the totalisator for the purpose of effecting betting transactions on horse races only on days when horse races, but no other races, take place on such racecourses. By s. 3, sub-s. 3, it is provided that the Board shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race after deducting a percentage, as therein mentioned, which we are told is in fact 10 per cent. Such percentage, as well as any other moneys received by the Board, are to be paid into a totalisator fund. This fund is to be applied by the Board in payment of all taxes, rates, charges, and working expenses, in retaining such sums as the Board may think fit to meet contingencies, in payment of such sums as the Board think fit to charitable purposes, and the balance is to be applied for purposes conducive to the improvement of breeds of horses or the sport of horse racing.

Such being the express powers of the Board material to the present question, it is plain that, unless the number of people placing bets with the Board's totalisator are sufficiently large, the totalisator fund may be insufficient to meet even the expenses of the Board. In that case not only would the Board be unable to continue to operate totalisators, but there would be no fund applicable under the Act for the purpose of improving the breed of horses or the sport of horse racing. Unless, therefore, the Board can take steps to induce persons to bet with their totalisators, the presumed intention of the Legislature will be defeated. I know nothing of the reasons that in fact influenced Parliament to enact the statute in question. But I am obliged to assume (1.) that it intended the Board to set up and thereafter to operate totalisators in the places and at the times specified in the Act, and (2.) that it intended the totalisator fund to be constituted and applied for the purposes indicated in the Act.

Now what in fact happened was this. The bets made on the totalisators of the Board by persons attending the racecourses where they were installed proved insufficient to provide the totalisator fund with enough to pay the expenses of the Board. The Board, in these circumstances, took steps to ensure that the number of bets placed with their totalisators should be materially increased. They accordingly approached the defendants, the London and Provincial Sporting News Agency, Ld. This company carried on what is known as a "blower" service, such service consisting in supplying from racecourses for bookmakers who are not on the course information as to the odds being offered on the course, and for laying off bets on behalf of such bookmakers. For this purpose the company had special telephone facilities on most of the racecourses. If the company could be induced to effect through the totalisator the bets placed with it by its clients it would redound to the advantage of the Board. The most obvious way of so inducing the company was to offer them a commission on the bets so placed, and this was the method employed. Various agreements were accordingly entered into from time to time between the company and the Board, the one that is the effective agreement at the present time being dated April 12, 1933. By cl. 1 of that agreement the company agrees to place with the totalisators of the Board, in cases where such machines are operating on courses where the company's telephones are installed, all bets received by the company in respect of which totalisator odds are asked for by the company's clients, and such other bets as the company may deem it advisable so to place in its own interest. The company also agrees to accept and place with such totalisators all bets which shall be received from (amongst others) the defendants, Tote Investors, Ld. In consideration of all this the Board agree to pay the company a commission on all effective bets so placed by the company. Why this agreement should be considered to be ultra vires the Board I am at a loss to conceive. If the Board is to exercise its powers successfully, it is essential that the bets placed with its totalisators should be as numerous as possible. The most ordinary and businesslike way of securing this is to pay a commission to a person or company who can influence the placing of such bets. The company's clients are in no way harmed. They will get the full totalisator odds, the commission being paid out of the 10 per cent. deduction as an expense. Nor will persons betting with the totalisator be in any way damnified. They too will continue to get the full totalisator odds. In these circumstances the payment of the commission can in my opinion be fairly regarded as incidental to and consequential upon the powers expressly conferred on the Board by the Legislature.

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Much the same considerations apply to some of the other steps taken by the Board to meet the emergency that had arisen. The defendants, Tote Investors, Ld., are a company through whom backers who themselves are unable to attend the racecourse can, in effect, have their bets transmitted to the course and placed with the totalisator. The backer is, however, betting on credit, the cash necessary to be paid into the totalisator to effect the bet on the racecourse being found by the company who, in the case of a win, receive the proper odds from the totalisator and are accountable for them to the backer.

It being obviously to the interest of the Board and indeed essential to the success of their undertaking that the bets transmitted to the totalisator by the company should be as numerous as possible, agreements have from time to time been entered into by them with the company to secure this result. The effect of these agreements is that the company are bound to transmit to the Board's totalisators and the Board are bound to accept all bets received and accepted by the company from its clients with certain immaterial exceptions. In consideration for the placing of these bets with the Board's totalisators, the Board agree to pay the company the commission specified in the agreements. So far the arrangement with Tote Investors, Ld., is in substance the same as that with the Blower Company, and the payment of the commission if permissible in the one case must be permissible in the other. The agreement with Tote Investors, Ld., however, provides for the payment by the Board of certain expenses incurred by the company in transmitting the bets to the racecourse, and further provides that the Board shall pay the expense of providing and making on certain racecourses a racecourse credit service. The payment of such expenses is said by the plaintiff to be ultra vires. But in both cases they are payments made solely for the purpose of increasing the number of bets placed with the totalisators, it being admitted that all the bets received through the credit service have to be so placed. I cannot regard the payment of these expenses as different in substance from the payment of the commission, and they must in my judgment be held to be intra vires the Board. It is indeed said on behalf of the plaintiff both as regards the commission and the expenses that in making them the Board are in some way engaging in " off-the-course " betting transactions, whereas their power under the Act was to engage by means of the totalisator in " on-the-course " betting transactions exclusively. This is a contention that I am unable to understand. If a man on the racecourse places a bet with the totalisator on behalf of a friend who cannot be there, neither he nor his friend nor the Board are engaging in " off-the-course " betting, and it would make no difference that the friend was given credit for the sum staked, or, so far as the Board is concerned, that the man made himself responsible to the friend for the amount of the totalisator odds. When, therefore, a client of Tote Investors, Ld., places a bet with them, the transaction between them may be properly described as " off-the-course " betting at totalisator odds. But when Tote Investors, Ld., by their agents on the course place the bet with the totalisator they are transacting " on-the-course " betting, and nothing else. What the Board are in effect doing by their arrangements with their co-defendants is to secure that certain transactions shall be carried out by means of " on-the-course " betting that would otherwise have gone through as " off-the-course " transactions. Tote Investors, Ld., for instance, might have carried on an " off-the-course " betting business merely laying their clients the totalisator odds. By virtue of the arrangement made with the Board they in effect cause all bets to be made on the course by means of the totalisator. But the Board are in no way conducting " off-the-course " betting transactions.

For these reasons, which are substantially those given by Eve J., I am of opinion that his decision was right and that the appeal fails except only in the respect following. By the memorandum of agreement of April 14, 1931, the Board agreed to pay to Tote Investors, Ld., in addition to the commission a sum of 1 per cent. of the turnover of the company as a special contribution towards the initial expenses up to the beginning of the flat racing season in 1932, and by an agreement of June 27, 1932, such payment was to be continued until the beginning of the flat racing season in 1933. It is in my opinion impossible to justify these payments. They are not in any way connected with the business of the Board in operating the totalisators, but with the general business of the company which as between itself and its clients is carrying on the business of "off-the-course" betting. Such a business is ultra vires the Board, and so therefore must be a contribution towards the expenses of carrying it on. It is one thing to pay a commission to a company carrying on such a business for placing its bets with the totalisator. It is quite another thing to participate in such a business to the extent of paying part of the expenses of carrying it on. The Board apparently claims the right to make and intends to continue making payments of this description. In my opinion an injunction should therefore be granted to restrain them from doing so, and to this extent the order of Eve J. should be varied.

MAUGHAM L.J. This appeal raises in my opinion no new question of law. It relates to the powers of a corporation, one, it is true, of a very singular nature, created by Act of Parliament solely with a view of carrying certain purposes into execution. It follows therefore from the decisions of the House of Lords in *Baroness Wenlock* v. *River Dee Co.* (1) and *Attorney-General* v. *Great Eastern Ry. Co.* (2), that, on the one hand, the powers of the corporation must either be expressly conferred by or be derived by reasonable implication from provisions of the Act of Parliament while, on the other hand, the doctrine ought to be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon the things which the Legislature has authorized ought not in the absence of express prohibition to be held to be ultra vires. The application of the law in the circumstances of this case is not, I agree, wholly free from difficulty, a circumstance mainly due to the curious and remarkable nature of the powers conferred on the Corporation, the first named defendant, whom I may describe shortly as

(1) 10 App. Cas. 354.

(2) 5 App. Cas. 473.

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the Board. By s. 1, sub-s. 2, of the Racecourse Betting Act, 1928, it was provided that the Board and any person authorized by them might set up and keep a totalisator on any approved racecourse and operate the same in accordance with the provisions of the Act and for the purpose of effecting betting transactions on horse races on days when horse races but no other races take place on the racecourse. The nature of a totalisator is explained by a definition in the Act and an agreed description, and I need not repeat them. The Board was incorporated by s. 2, and provisions are therein contained for appointing the chairman and the other eleven members of the Board. There are no other corporators, and it may be observed that the Board is not trading for the profit of its corporators, since by s. 3 of the Act the Board is bound to distribute the whole of the moneys staked by means of a totalisator on any race among the persons winning their bets after deduction only of such percentage of those moneys as the Board may determine. It may be here noted that the usual percentage is 10 per cent. A fund known as the totalisator fund is established into which the percentages have to be paid, and subject to the payment out of this fund of all taxes, rates, charges, and working expenses, and to the retention of sums for contingencies, and to the payment out of the fund of such sums as they may think fit for charitable purposes, the Board must apply the moneys from time to time comprised in the fund for purposes conducive to the improvement of the breeding of horses, or for the sport of horse racing. By sub-s. 7 of s. 3 the Board may do all such things as are incidental to the foregoing matters.

It emerges from these provisions that the Board is established for the purpose of setting up and operating, subject to certain conditions, certain machines or instruments for betting on approved racecourses designed for the purpose of receiving bets, determining the odds on a fair basis, and subject to a percentage being deducted for expenses, to pay the whole of the amounts received to the fortunate winner. The totalisators can only be set up on approved racecourses; but this geographical restriction on the activities of the Board does not import that the bets passed through their machines must be bets made by persons attending the racecourse. There is nothing in the Act to prevent members of the public giving to a person who goes to a race meeting a commission to back particular horses, and the Legislature cannot be assumed to have thought that the bets which go into the totalisator would merely be bets by persons attending the race meeting. On the other hand it could not have escaped the notice of the Legislature that firms (sometimes described as "turf accountants") would be likely to collect bets from their clients on the terms that the bets, subject perhaps to a commission, were to be placed in the totalisators of the Board.

It should here be noted that the defendants, Tote Investors, Ld., and the News Agency Company are independent trading companies formed under the Companies Acts for the purpose of making profits for their members. Their connection with the Board is of the nature of a trading relation effected by means of the agreements under seal, the effect of which has already been stated. There is nothing in the agreements to prevent the companies from undertaking business other than that of totalisator betting.

Large payments have been made by the Board to the two companies by way of commission payable under the terms of the agreements, and no doubt the consideration has been that the company have placed or procured the placing of large bets with the totalisators. These payments constitute the substantial ground for the present action, and they are the subject of the first declaration claimed, until it was amended on November 13, 1933. By amendment however the plaintiff claimed that another payment by the Board was ultra vires, namely, the payment of a contribution towards the expenses of Tote Investors, Ld. I shall deal later with this part of the case, and shall consider in the first place merely the important question of commissions paid by the Board.

I do not think it can be doubted that Tote Investors, Ld., or the News Agency Company or any company in their position might collect bets from their clients and place them

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on the totalisators, with the result that members of the public not attending the racecourse would have the advantage of betting on the totalisator subject only to the deduction of a commission if the bets were successful. The main, if not the only difference in substance between this and what is in fact done by the Board is that the Board is paying or agreeing to pay to Tote Investors, Ld., or to the News Agency Company out of the totalisator fund a commission in consideration of these defendants placing bets whether on behalf of themselves or members of the public upon the totalisators operated by the Board. In substance then the only difference between that which Tote Investors, Ld., might plainly do by arrangement with the Board and that which is objected to is that the Board pays the commission. No doubt this has the result in practice of increasing the bets which reach the totalisator, but I can find no indication in the Act that the totalisators were intended to diminish the amount of " off-the-course " betting, and the effect of the agreements between the Board and its two co-defendants in increasing the amount of the " off-the-course " betting must I think be regarded as irrelevant for the purpose of considering the limits of the powers of the Board. In my opinion no question of public policy is involved in the case.

The limit on the powers of the Board as regards things which are incidental to the powers expressly conferred on them is to be found, in my opinion, within the corners of the Racecourse Betting Act, 1928, considered no doubt in connection with the previous legislation affecting betting. I can see no good reason for the view that the Board is not entitled to make such expenditure on advertisements or publicity as would be likely to bring in sufficient bets to enable the Board to pay the heavy expenses of setting up and operating the totalisators, and such expenditure must be met out of the sums which they are authorized to deduct from the stake moneys. It seems to me that the Board must be regarded, to some extent at least, as carrying on the business of mechanical bookmakers; and I can find nothing in the Act to suggest that the business is not to be rendered a prosperous one by means of any form of advertisement. If that be so, I do not see why they may not pay a commission to an outside company which brings them business in the form of bets which pass through the totalisators and go to swell the percentages which the Board is entitled to deduct under s. 3 of the Act. Nor can I see why the Board should not be at liberty to pay for the services rendered to them pursuant to cl. 7 of the Agreement of January 19, 1931, or the expenses incurred under the clause in providing accommodation to Tote Investors, Ld., while engaged in furthering the interests of the Board.

I am not forgetting that under cl. 3 of the Agreement of January 19, 1931, with Tote Investors, Ld., there are provisions for a division between the company and the Board in certain ways of the profits of the company available for dividend in any year in excess of 10 per cent. on the paid-up capital of the company. This I think is designed to prevent that company from making an excessive profit out of the commissions, and is not an unreasonable business provision in the circumstances of the case. It certainly does not have the effect of making Tote Investors, Ld., the agents for all purposes of the Board, nor does it give the latter the control of the former in any real sense. As regards the acts of the company in procuring bets and translating or transmuting them into cash bets at a totalisator, I am of opinion that the most that can be properly asserted by the plaintiff is that the companies occupied the position of independent contractors in performing these acts; they are not, I think, agents for the Board to collect the bets. The general proposition that was urged upon us by counsel for the appellant, that the Board cannot properly pay agents to do that which they have not power to do themselves, is, in my opinion, not in question in the present case. If it is a thing incidental to the matters referred to in s. 3 of the Act that the Board should remunerate the companies for procuring or collecting large numbers of bets from third persons and placing them on the totalisators, and in my opinion it is, the main contention of the plaintiff must fail.

The matter raised by the amendment arises on the agreements of April 14, 1931, and June 27, 1932, by which the Board agreed to pay special contributions towards in the first case "the initial expenses" of Tote Investors, Ld., up to the beginning of the flat races in the year 1932, and in the second case to pay such contributions to the expenses of Tote Investors, Ld., up to the beginning of the flat racing season in the year 1933. These or similar payments the Board intend to continue making (Defence, para. 10), and the question therefore has to be determined whether a declaration should not be made or an injunction be granted to restrain such payments.

The difference between these payments and those which I have already dealt with is that the latter are payments made directly in connection with and in consideration for services rendered to the Board, and that the former are in the nature of contributions to Tote Investors, Ld., not earmarked in any way, that is, general payments for the benefit of the Company. The agreement of April 14, 1931, was apparently of a voluntary character, and I see no reason to suppose that the continuation of the contribution by the later agreement as "a special contribution" towards the expenses of the company is of a different character. Apart, however, from this, my opinion is that such a contribution, not being in connection with services rendered to the Board, and bearing in mind the fact that the objects of Tote Investors, Ld., and its business include things which the Board is itself unable to do, is ultra vires.

There is no doubt a difficulty in these cases in drawing the line, a difficulty which to some extent resembles that which judges and jurists have so often discussed in connection with remoteness of damage. It is not sufficient to say that an act done by a statutory company may conduce to its benefit. If it were, such cases as those of *Attorney-General* v. *Great Northern Ry. Co.* (1), *London County Council* v. *Attorney-General* (2), and other cases referred to by the Master of the Rolls, would have been differently decided. The connection between the statutory purposes of the Board and an act not expressly authorized, but alleged to be incidental or conducive

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(1) (1860) 1 Dr. & Sm. 154.

(2) [1902] A. C. 165.

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to one that is, must be sufficiently direct and established with sufficient clearness. I have come to the conclusion that the plaintiff succeeds on the matters raised by the amendment, and that the agreement of April 14, 1931, and the paragraph in the agreement of June 27, 1932, pledged the Board to make payments which were beyond its statutory powers. There must be a declaration and an appropriate injunction.

Appeal dismissed except on one point.

Solicitors: *Arthur Benjamin & Cohen; Simmons & Simmons.*

H. C. G.

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In re MAUNDY GREGORY.

Ex parte NORTON.

[No. 386 of 1933.]

Bankruptcy—Examination of Witness—Information respecting dealings of Debtor—Refusal of Witness to answer questions—Compromise of Action against Debtor for return of Bonds—Admissibility of questions to test legality of Compromise—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25.

W., who had deposited with the debtor bonds of the value 30,000*l.* and shortly before his death had made a demand for their return to him with which the debtor refused to comply, died on July 12, 1930. On February 23, 1931, the executors of W.'s will brought an action against the debtor claiming the return of the bonds. In November, 1931, the plaintiffs discovered correspondence which disclosed the fact that the debtor had made proposals to W. for obtaining for him an honour from His Majesty, and they communicated this to the defendant's solicitors. On January 14, 1932, a compromise of the action was arranged between counsel under which the debtor consented to return the value of the bonds, and by January, 1933, this was in fact done. On May 23, 1933, the debtor was adjudicated bankrupt. In the bankruptcy N., one of W.'s executors and the surviving plaintiff in the action, was, under s. 25 of the Bankruptcy Act, 1914, summoned

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to give evidence and produce documents relating to the deposit of the bonds with the bankrupt. N. was asked whether, after reading the correspondence between W. and the bankrupt, he understood that the transaction related to some trafficking in honours. On the advice of his counsel N. refused to answer the question. The matter was accordingly reported by the Registrar to Clauson J., who on June 11, 1934, made an order directing N. to answer the question.

On appeal :—

Held (reversing the decision of Clauson J.), that as the compromise was not impugned by any documents, materials or evidence before the Court and thus stood good and binding, it would not be right to compel an answer from the witness in respect of a matter to which he was not prima facie shown to be a party or privy. The Court must deem the witness capable of giving information on some grounds that appeared to have a foundation. It ought not to lend itself to a mere fishing inquiry based upon the trustee's hope to build up some case as to which there was before the Court no information showing that the witness was implicated.

APPEAL from a decision of Clauson J.

The following statement of the facts is taken from the considered judgment of Lord Hanworth M.R. : " The question to be decided in this appeal is whether Mr. W. T. Norton—a witness who was summoned to give evidence in the above bankruptcy under s. 25 of the Bankruptcy Act, 1914—should be ordered to reply to certain questions put to him in the course of his examination by counsel for the trustee of the bankrupt's estate.

" The Registrar allowed the questions to be put to the witness ; but, under the advice of his counsel, he refused to answer them. The Registrar thereupon, pursuant to r. 86, reported the refusal to Clauson J., who made an order on June 11, 1934, requiring the witness to answer the questions with the usual sanction in case he should refuse to obey that order.

" From that order the witness has appealed to this Court.

" Some facts must be recalled as relevant to the consideration of the points involved.

" It appears that bonds of a British issue of French Rentes of large value, together with 4000*l*. worth of 2½ per cent. Consolidated Stock, in the form of certain specified bonds, were on March 27, 1930, placed in the debtor's hands by

Sir W. G. Watson, who died on July 12, 1930, and the witness W. T. Norton is one of the executors of his will. Just before he died—on July 6, 1930—the testator directed the debtor to hand over the above mentioned bonds to Lloyds Bank at their head office in Lombard Street to his—the testator's—order. The debtor did not comply with this direction, but converted the bonds and the coupons upon them to his own use. The executors on February 23, 1931, commenced an action against the debtor claiming the return of the before mentioned bonds as wrongfully converted by the debtor, or alternatively as money had and received to the testator's, and thus to the plaintiffs' use. The debtor admitted the receipt of the bonds, but alleged that on April 22, 1930, they had been made a gift to him, and in answer to an interrogatory stated that he had sold the bonds in September, 1930, and that they had realized the net sum of 30,081*l.* 5*s.* after deducting the broker's commission.

"The case came into the list for trial before Wright J.—as he then was—on January 14, 1932, when a compromise by consent was arranged between eminent leading counsel for the plaintiffs and the defendant, whereby the defendant agreed to pay 10,000*l.* forthwith, a further sum of 10,000*l.* on July 13, 1932, and 10,206*l.* on January 13, 1933, and also a sum of 380*l.* forthwith as the agreed costs of the action. The defendant was also to pay interest at 5 per cent. on any balance outstanding, and to provide security for the payment of the sums outstanding. Upon default of compliance with any of the above terms, the whole sum outstanding of principal and interest was to become immediately payable. On these terms all further proceedings in the action were stayed except for the purpose of carrying them into effect. In fact the debtor paid the first instalment, and the last two instalments were paid by the guarantor by whom they had been secured as required by the terms of the compromise.

"In November, 1931, some pencil draft letters in the testator's handwriting were discovered: one of them was dated December 7, 1923, and one letter from the debtor, dated November 29, 1923, to the testator, which indicated that the debtor had been making proposals to the testator with a view to securing that an honour should be bestowed upon the latter by His Majesty, and there was a letter dated June 29, 1926, from the debtor which stated that 'the strike has butted in and caused the entire side-track of our collection of names which were otherwise fully approved of.' All these letters were disclosed by the solicitors for the executors to the solicitor for the debtor by letters to the latter dated November 4 and 5, 1931, more than two months before the case came on.

"The act of bankruptcy on which the proceedings were founded was committed on April 6, 1933, under an execution—s. 1, sub-s. 1 (*e*), of the Bankruptcy Act, 1914. The debtor's goods were seized on March 18, 1933, and sold on April 6, 1933.

"The receiving order was made on May 2, 1933, and the adjudication followed on May 23, 1933. The debtor has not surrendered to the proceedings, and has not filed any statement of his affairs, with the result that the trustee has been placed in the difficulty of there being no preliminary examination of the debtor, no statement of affairs, no public examination, and he has had no interviews with the debtor. The last instalment payable under the compromise was paid within three months before the act of bankruptcy—within the period of the relation back of the trustee's title, while the compromise itself was outside this period, though within the two years within which, in certain events, a settlement of property not made in favour of a purchaser in good faith and for valuable consideration can be avoided by the trustee under s. 42 of the Act."

On June 11, 1934, Clauson J. decided that the questions must be answered on the ground that the answers might throw light on the dealings of the bankrupt and furnish the trustee with information which would assist him (*a*) in dealing with any claims which the guarantor might make in the bankruptcy in respect of the payments made by him to the plaintiffs in fulfilment of his obligation under the guaranty, and (*b*) in determining whether, with a view of enlarging the assets of the bankrupt, he ought to take any and what steps to impugn the legality of transactions the action in respect of which was compromised within two years of the commencement of the bankruptcy, and (*c*) in any event, to deal with the complicated questions which would be likely to arise in the administration of the bankrupt's estate.

Norton appealed. The appeal was heard on June 29, 1934.

Tindale Davis for the appellant. The question is whether the questions put to the witness in this case were proper questions to be put and ought to be answered. The powers given by s. 25 of the Bankruptcy Act, 1914, are very wide in their terms and ought to be very carefully exercised: *Ex parte Willey.* (1)

[SLESSER L.J. referred to *Ex parte Vogel.* (2)]

It is to be remembered that an examination under the section is an examination by the Court. As a general proposition a trustee in bankruptcy ought not to be allowed to put any question to a witness unless it can benefit the estate by creating assets.

Here there is no evidence before the Court which in any way impugns the bona fides of the compromise. The compromise therefore stands good and the trustee cannot go behind it or question its validity: *In re Van Laun* (3); *In re a Debtor* (No. 27 of 1927). (4) Whatever the answers to the questions put to the witness might be, the trustee could not recover back the money paid under the compromise. That being so the questions put are futile and ought not to be ordered to be answered.

Some suggestion is made that the money paid by the bankrupt to the testator's executors in pursuance of the compromise was a voluntary settlement within s. 42 of the Bankruptcy Act, 1914, and void as being made within two years of the bankruptcy. But in *In re Cole* (5) it was held by Farwell J. that "The authorities establish that when once the Court is satisfied that there has been a compromise of legal proceedings brought in good faith, that compromise, at any rate for the purpose of supporting a contract, represents good consideration, and it is not for the Court to determine whether or not the action could or would have succeeded if prosecuted to the end." Sect. 42 therefore can have no application in the present case. There is here no evidence that the compromise was not a bona fide one.

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(1) (1883) 23 Ch. D. 118, 128.
(2) (1818) 2 B. & Ald. 219, 225.
(3) [1907] 1 K. B. 155.
(4) (1928) 13 B. & C. R. 34.
(5) [1931] 2 Ch. 174, 178.

[He also referred to *In re Coulson* (1) and *In re a Debtor. Ex parte Goldstein.* (2)]

Gilbert Beyfus K.C. and *Sir George Jones* for the respondent. It is not correct to say that no question is admissible under s. 25 unless the answer to it can benefit the estate by creating assets. The primary object of the section is, it is submitted, to enable the trustee to obtain information which will enable him to shape his case and to find out its strength.

Here the result of the action has been called a compromise, but it was in fact a complete surrender by the bankrupt. It is said that a bona fide compromise cannot be interfered with, but the object of the questions asked was to ascertain whether the compromise was in fact bona fide. Here the trustee would be failing in duty if he did not investigate a compromise entered into only fifteen months before the commencement of the bankruptcy. He is therefore entitled to ask questions to test its bona fides. The Court ought not therefore to fetter his investigation by refusing to allow the questions to be answered. The sole object of the trustee is to ascertain the facts of the case.

[They referred to *Parkinson* v. *College of Ambulance, Ld.* (3)]

Tindale Davis replied.

Cur. adv. vult.

July 6. LORD HANWORTH M.R. read the following judgment, in which, after stating the facts as above set out, he continued: sect. 25 is intended to provide, and does provide, means whereby a trustee, placed in the difficulty which prevails in the present case—where the debtor has kept away and rendered no assistance—can make inquiry for the purpose of

(1) (1933) 16 B. & C. R. 173, 175. (2) [1917] 1 K. B. 558, 563.
(3) [1925] 2 K. B. 1.

obtaining "information respecting the debtor, his dealings or property." That is, of course, information material to the duties imposed on the trustee and to the matters with which he is concerned thereunder: see *Ex parte Vogel.* (1)

It will be noted that the duty of deciding whether a person shall be summoned is given by s. 25 to the Court—that is the Registrar—acting upon the application of the Official Receiver or trustee. The words are: "The court may . . . . summon before it . . . . any person whom the court may deem capable of giving information respecting the debtor, his dealings or property. . . . ."

The powers given to the Court under the section are very wide, as indeed it is essential that they should be. Yet it is also important to bear in mind the caution given by Sir George Jessel in relation to it: see *Ex parte Willey.* (2) He says: "It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised." Later on (3) he draws attention to the distinction between the bankrupt and other people in this connection: "You can examine him [the bankrupt] to any extent upon the application of any one; but as regards the examination of other people I wish expressly to reserve my opinion, and treat the point as one still to come for decision." See also per Abbott C.J. in *Ex parte Vogel* (4), where he speaks of the great caution and discretion required.

The questions that were asked and which the witness refused to answer were these: "Q. When you found the setting out by Sir George of his various gifts and the putting down of Viscount Esher's name as one of his references, you knew then that there was an honour in contemplation?" The witness on the advice of his counsel declined to answer. "Q. (228 in the shorthand note) I suggest that when a man of your education and experience saw that letter"—referring to a letter dated June 29, 1926, which had been read to the

(1) 2 B. & Ald. 219.
(2) 23 Ch. D. 118, 128.
(3) 23 Ch. D. 130.
(4) 2 B. & Ald. 219, 228.

witness—" and saw the previous letters, you knew quite well then that something was going on for what I call honour trafficking ? "

The purpose of the questions—as we were told, and it is made plain by some other questions—was to discover the opinion of the witness on the letters which, as already stated, were discovered and were dated in or belonged to the years 1923 and 1926 and indicated that there had been some honour trafficking at that time. The answers, if in the affirmative, were claimed by counsel for the trustee to be useful " to build up " a case on which the settlement of the action made in January, 1932, could be reopened and the money that had been repaid to the estate of the testator recovered by the trustee for the estate of the debtor and ultimately for the use of the creditors. *Parkinson* v. *College of Ambulance, Ld.* (1), was cited to show that the payment of a sum in order to secure an honour was an unlawful transaction as contrary to public policy and could not found a good cause for the repayment of money advanced.

Clauson J. decided that the questions ought to be answered, because " the answers may assist and very likely will assist the trustee towards making up some case which may or may not ultimately be successful, which may impugn the transaction by way of compromise of the action which took place within two years of the commencement of the bankruptcy."

It was decided in *In re a Debtor* (2) by a Divisional Court (Astbury J. and Clauson J.)—and we think rightly—that where an action is ended by a compromise, the Bankruptcy Court will not go behind the compromise if it has been made by independent counsel, and it is not impeached as fraudulent. It is only necessary to refer to the direction given by the testator on July 6, 1930, to make it plain that the executors had foundation—indeed a duty—for their proceeding by action to endeavour to recover the moneys handed over.

In a recent case of *In re Cole* (3) Farwell J. decided that a bona fide compromise of a bona fide action claiming rights against a defendant's property is valuable consideration within the words of s. 42 of the Bankruptcy Act, 1914, for a settlement of that property made by the defendant under that compromise. It is not for the Court to determine whether or not the action could or would have succeeded if prosecuted to the end. The compromise of a bona fide claim is good consideration: see *Miles* v. *New Zealand Alford Estate Co.* (1)

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(1) [1925] 2 K. B. 1.
(2) 13 B. & C. R. 34.
(3) [1931] 2 Ch. 174.

Upon the materials before the Court there is no ground for challenging the bona fides of the compromise and whether the questions were answered in the affirmative or in the negative: the trustee would be in no better position in this respect. The debtor appears in no case to have had any moral claim to retain the bonds—if the interpretation sought to be derived from the letters in 1923 and 1926 that were discovered, are to be used to colour the transaction.

The witness at the outset of his examination stated that he was not well acquainted with the affairs of the testator. He said—" only since I took over the executorship "—though he had acted as his private secretary at an earlier date down to the very early part of 1917. There is no evidence that he was privy to whatever took place in 1923, or 1926, or that he induced the compromise, or acted otherwise than under the advice of his counsel.

In *Ex parte Goldstein* (2) it is plainly laid down that s. 25 is not to be treated as if it embraced every one that the trustee, or Official Receiver, may wish to cross-examine, nor any person who makes—or might make—a proof; but only persons whom the Court may " deem capable of giving information respecting the debtor, his dealings or property."

It would not be wise to attempt a definition of the limits within which an order for examination can be made, or an answer compelled, under s. 25. But if the claim to either is challenged, it seems to us that when a compromise has been made which is not impugned by any documents, materials, or evidence before the Court, and thus stands good and binding, it would not be right to compel an answer from a witness in respect of a matter to which he is not prima facie

(1) (1886) 32 Ch. D. 266.

(2) [1917] 1 K. B. 558.

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shown to have been a party or privy. The Court must deem the witness capable of giving information upon some grounds that appear to have a foundation. It ought not to lend itself to a mere fishing inquiry based upon the trustee's hope to build up some case as to which there is before the Court no information showing that the witness was implicated.

In the present case we are not satisfied that the above conditions have been complied with, and we allow the appeal with costs here and below and discharge the order of June 11, 1934, and also the direction of the Registrar that the questions should be answered.

SLESSER L.J. I agree.

ROMER L.J. I agree.

Appeal allowed.

Solicitors for appellant: *Lamb, Son & Prance.*
Solicitors for respondent: *Isadore Goldman & Son.*

W. I. C.

CLAUSON J.
1934
July 23.

In re ALLEN.

[1106 of 1932.]

Bankruptcy—Practice—Order of Board of Trade to transmit account—Defaulting Trustee—Immediate Order for committal—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 13*—Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 105, *sub-s.* 5.

The Court has jurisdiction under s. 105, sub-s. 5, of the Bankruptcy Act, 1914, to make an immediate and unconditional order for the committal of a trustee of a deed of arrangement for non-compliance with an order of the Board of Trade made in pursuance of s. 13 of the Deeds of Arrangement Act, 1914, to transmit an account of his receipts and payments as such trustee.

THIS was a motion by the Board of Trade for an order to commit to prison the respondent, the trustee under a deed of arrangement dated July 7, 1930, and made between the debtor and his creditors, in consequence of his default in obeying certain orders made by the Board of Trade (hereinafter more particularly mentioned) to transmit to the Board accounts of his receipts and payments as trustee of the said deed.

By the Deeds of Arrangement Act, 1914, s. 13, sub-s. 1, it is provided that a trustee under a deed of arrangement should, at such times as might be prescribed, transmit to the Board of Trade or as they should direct an account of his receipts and payments as trustee in the prescribed form and verified in the prescribed manner: see Deeds of Arrangement Rules, 1925; Part V., Forms Nos. 15, 17 and 20.

By an order made by the Board of Trade dated May 12, 1933, the respondent trustee was ordered to transmit to the Board within seven days after service of the order an account of his receipts and payments as trustee of the estate comprised in the said deed of arrangement from July 7, 1930, to July 12, 1931, such account to be verified by affidavit or, as the case might be, that he should within the time aforesaid forward to the Board an affidavit of no receipts or payments: and, on May 12, 1933, and March 19, 1934, similar orders were made for the transmission of accounts of his receipts and payments for the periods from July 13, 1931, to July 12, 1932, and from July 13, 1932, to July 12, 1933, respectively. Those orders were personally served upon the respondent, but he failed to comply with them; and, accordingly, on July 3, 1934, he was duly served with notice of this motion.

Tindale Davis for the applicant, the Board of Trade. I ask for an immediate order for the committal of the respondent. By s. 13, sub-s. 2, of the Deeds of Arrangement Act, 1914, this court is empowered to enforce an order made by the Board of Trade against a trustee under a deed of arrangement to transmit an account by exercising the powers conferred upon it by s. 105, sub-s. 5, of the Bankruptcy Act, 1914, in cases of bankruptcy. (1)

(1) Sect. 105, sub-s. 5: " Where default is made by a trustee, debtor, or other person, in obeying any order or direction given by the Board of Trade, or by an official receiver or any other officer of the Board of Trade under any power conferred by this Act or any enactment repealed by this Act, the court may, on the application of the Board of Trade or an official receiver or other duly authorized person, order such defaulting trustee, debtor, or

In the case of *In re Margetts* (1) the court refused an application by the Board of Trade to make a committal order not to be drawn up if the order of the Board to furnish accounts were complied with within seven days, but made an order upon the trustee to comply with the order of the Board and required the Board to make a fresh application to enforce compliance with the order by committal: and in *In re Nicholson* (2) an immediate order was made, but subject to a condition that it should not be issued if within a week the trustee complied with the order of the Board of Trade. But it is submitted that notwithstanding the orders made in those cases, this court has jurisdiction under that subsection to make an immediate order for the committal of the respondent without attaching to the order any condition in favour of the respondent: and the default of the respondent in complying with the orders of the Board was of so serious a nature as to justify the exercise by the court of that jurisdiction.

The respondent trustee did not appear.

CLAUSON J. This is a bad case. I will make an order for committal forthwith. I have power by virtue of s. 105, sub-s. 5, of the Bankruptcy Act, 1914, to make an immediate order for his committal and I do so. It may be that, the order having been made, the respondent will either before or after his arrest comply with the directions contained in the orders of the Board of Trade. But even if he should comply with those directions and apply for his release, I should not myself, if the application came before me, be disposed to release him until he had been in prison for a period sufficient to mark the Court's serious view of his default.

Solicitor: *Solicitor to the Board of Trade.*

person to comply with the order or direction so given; and the court may also, if it thinks fit, upon any such application, make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this subsection shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default."

(1) (1884) 1 Mor. 211.

(2) (1888) 5 Mor. 278.

H. C. H.

In re CHESTERS.

WHITTINGHAM *v.* CHESTERS.

[1934. C. 1.]

BENNETT J.

1934
July 10, 11, 25.

Will—Mortgage—Payment off by tenant for life in remainder—Whether charge kept alive.

When a tenant for life in remainder pays off a mortgage on the property, the mortgage is, in the absence of evidence of a contrary intention, kept alive for his benefit.

Wigsell v. *Wigsell* (1825) 2 Sim. & St. 364 considered and applied.

ORIGINATING SUMMONS.

THE following statement of the facts is taken from his Lordship's judgment:—

The relevant facts are that the testator by his will devised all his freehold shops and premises situate in Pillory Street, High Street, and Hospital Street, Nantwich—which at the time of his death were charged with payment of moneys due to the Royal Exchange Assurance—to the uses and upon the trusts and subject to the powers and provisions following, that is to say, to the use of his wife Sarah Ann Chesters during her life with remainder to the use of his son Colin Flint Chesters during his life upon protective trusts and from and after the death of his said son to the use of the child or children of his said son if more than one in equal shares as tenants in common in fee simple. The testator died on July 11, 1927. The executors of his will were his widow Sarah Ann Chesters, the plaintiff, and his son Colin Flint Chesters, who proved his will on December 9, 1927. At some date or another, not known, there came into the possession of Colin Flint Chesters a document dated November 7, 1927, addressed to the testator, Joseph Chesters, Esquire, containing a statement of the loan and interest due to the Royal Exchange Assurance. The statement shows " the sum of 513*l*. 19*s*. 6*d*. as due to 30 November 1927." On November 29, 1927, Colin Flint Chesters wrote to the Secretary of the Royal Exchange Assurance: " I regret to say that I have mislaid your statement of principal and interest due to be paid on the

30th inst. I am enclosing an open signed cheque—kindly fill in the correct amount and present for payment. Please enclose the statutory receipt and return to me per registered post the deeds and documents—I will see to the stamping of them myself. I believe the amount due to you is in the neighbourhood of 520*l.* Please let me have a copy of your statement which I have mislaid. Yours faithfully Colin F. Chesters."

That letter was replied to by the Secretary of the Royal Exchange Assurance in a letter dated December 1, 1927, in which he says: "Dear Sir, *re Loan—J. Chesters*—I am in receipt of your letter of the 29th ult. enclosing an open signed cheque which has been completed for the sum of 513*l.* 19*s.* 6*d.*, being the amount required, as set out on the attached copy statement, to fully repay the above loan. I note you wish me to endorse a statutory receipt on the mortgage and return the deeds and documents to you, but, under the Law of Property Act, 1925, the statutory receipt takes the place of a transfer of the property and it will therefore be necessary for the matter to be carried through by the Corporation's solicitor. As the costs will have to be borne by you I await hearing further before giving definite instructions. Yours faithfully Percy F. H. Hodge, Secretary."

The cheque which had been sent by Colin Flint Chesters was his own cheque drawn on his own banking account and was met out of his own money. On receipt of the letter of December 1, Colin Flint Chesters went to see his solicitors and saw a managing clerk, Mr. Charles Sutton Latham, who has made an affidavit in which he says: "On December 2, 1927, Colin Flint Chesters called at the Plaintiff's office at 4 Pepper Street, Nantwich, aforesaid and was attended to by myself personally. He placed before me the letter addressed to him by the Royal Exchange Assurance dated December 1, 1927, which is also exhibited to the said affidavit of the defendant Marion Chesters, with the remark 'Here, attend to this.' Beyond so placing the said letter before me the said Colin Flint Chesters gave me no further instruction in the matter. I accordingly prepared the statutory receipt in the usual form and forwarded it to the said Corporation with the said letter dated December 1, 1927. The form which the receipt should take was given careful consideration by the plaintiff and myself so as to make the title to the said premises satisfactory for an intending purchaser when it should become necessary to sell the premises in accordance with the terms of the testator's will and accordingly the receipt was drawn in the form provided for by s. 115 of the Law of Property Act, 1925. The position as between Colin Flint Chesters and the testator's estate with regard to the payment off of the said mortgage was not taken into consideration either by myself or to the best of my knowledge from the instructions I received, by the plaintiff. The matter was duly carried through in this way and the deeds were handed over to and retained by the plaintiff as senior trustee of the testator's will."

The solicitors then prepared a statutory receipt to be endorsed on the mortgage, and the statutory receipt as prepared and agreed between the solicitors and as sealed by the Royal Exchange Assurance was in this form :—We, the undersigned Royal Exchange Assurance hereby acknowledge that we have this Thirtieth day of December one thousand nine hundred and twenty seven received the sum of Five hundred pounds representing the balance remaining owing in respect of the principal money secured by the within written Mortgage dated the thirty first day of October one thousand nine hundred and twelve Together with all interest and costs the payment having been made by Sarah Ann Chesters of London Road Willeston near Nantwich in the County of Chester Widow Joseph Parton Whittingham of Nantwich aforesaid Solicitor and Colin Flint Chesters of London Road Willeston aforesaid Grocer and Provision Merchant as Executors of the Will of Joseph Chesters late of Nantwich aforesaid Grocer and Provision Merchant deceased out of money properly applicable for the discharge of the said Mortgage. In witness whereof the Royal Exchange Assurance has hereunto caused its common seal to be affixed the day and year first before written.

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On December 30, 1927, Sarah Ann Chesters was alive and was entitled under the testator's will to the freehold shops and premises in Pillory Street, High Street, and Hospital Street aforesaid as tenant for life.

The executor of the will took out a summons for the determination of several questions, the only question material for the purpose of this report being whether the plaintiff ought to pay to the defendant Marion Chesters, the legal personal representative of Colin Flint Chesters (who died on June 20, 1933), out of the proceeds of sale of the premises charged by the mortgage, the sum of 500*l.*, paid by Colin Flint Chesters in payment off of the mortgage.

Andrew Clark for the plaintiff.

Preston K.C. and *R. O. Wilberforce* for the legal personal representative of Colin Flint Chesters. The legal personal representative of Colin Flint Chesters is entitled to the 500*l.* paid by him, when he was tenant for life in remainder, in payment off of the mortgage. The tenant for life in remainder is entitled to have the charge kept alive for his own benefit: *Gifford (Lord)* v. *Fitzhardinge (Lord)* (1); *Horton* v. *Smith* (2); *Wigsell* v. *Wigsell.* (3)

R. F. Roxburgh K.C. and *H. Gamon* for a beneficiary. The rules as between a tenant for life and remaindermen do not apply. When no steps are taken by the tenant for life to collect rents and profits the presumption is raised that there is no intention to keep the mortgage alive for the benefit of the estate: *In re Lord Chesterfield's Settled Estates* (4); *In re Hulse. Beattie* v. *Hulse* (5); *Pitt* v. *Pitt* (6); and *Pinder* v. *Pinder.* (7)

Where a tenant in tail pays off an incumbrance the presumption is that he does it, not for his own benefit, but for the benefit of the estate: *St. Paul* v. *Viscount Dudley and Ward.* (8) [They also referred to *Burrell* v. *Earl of Egremont* (9) and *In re Harvey. Harvey* v. *Hobday.* (10)]

(1) [1899] 2 Ch. 32.
(2) (1858) 4 K. & J. 624.
(3) 2 Sim. & St. 364.
(4) [1911] 1 Ch. 237.
(5) [1905] 1 Ch. 406.
(6) (1823) T. & R. 180.
(7) (1870) 18 W. R. 309.
(8) (1808) 15 Ves. 167.
(9) (1844) 7 Beav. 205, 232, 236.
(10) [1896] 1 Ch. 137.

C. R. R. Romer for another beneficiary referred to *Jones* v. *Morgan* (1) and Halsbury's Laws of England, vol. 25, p. 320, para. 1091.

H. A. Rose for another beneficiary.

A. Andrewes-Uthwatt for the Attorney-General.

Preston K.C. in reply.

BENNETT J. The question on this originating summons is whether the plaintiff ought to pay the defendant, Marion Chesters, out of the proceeds of sale of certain premises comprised in and charged by a mortgage dated October 31, 1912, and made between the testator of the one part and the Royal Exchange Assurance of the other part, the sum of 500*l.* paid by the testator's son Colin Flint Chesters, who is now dead, in payment off of the mortgage.

[His Lordship stated the facts as above set out and continued:] The effect of that receipt under s. 115 of the Law of Property Act, 1925, was either—if the mortgage took effect by demise—to merge the term or—if it did not take effect by demise—to reconvey the mortgaged premises to the extent of the interest which was the subject of the mortgage and in either case to discharge the mortgaged property from all principal and interest secured by the mortgage; and it is on these facts that the question arises. The argument on behalf of the defendant Marion Chesters was that the money in discharge of the mortgage having been paid by the tenant for life in remainder, the presumption arises in law that he intended to keep the charge alive for his benefit, and that there is no distinction to be drawn between the presumption which arises in the case of payment by a tenant for life in remainder and the presumption which it is conceded would have arisen if the payment had been made by him at a time when he was tenant for life in possession. On the other hand it is said that the presumption which arises in the case of a tenant for life in possession does not arise in the case of a tenant for life in remainder, and that in such a case it must be shown by evidence that when the payment was made there was an intention in the mind of the person making the payment to keep the charge alive.

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(1) (1783) 1 Bro. C. C. 206, 218.

Apparently there is very little authority as to what the presumption is in the case of a tenant for life in remainder. In the case of a tenant for life in possession it seems to be clearly settled. But I think the matter is settled so far as I am concerned by the observation of Leach V.-C. in *Wigsell* v. *Wigsell* (1), where the Vice-Chancellor was dealing with the discharge of a mortgage by a tenant in tail in remainder and it was sought to say that a tenant in tail in remainder was in the same position as a tenant in tail in possession. The Vice-Chancellor says: " Where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases; because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person; and it must be inferred that such a tenant in tail means to keep the charge alive."

It seems to me that the case of a tenant for life in remainder is an a fortiori case, and that no distinction is to be drawn between payment off of a mortgage upon the inheritance by a tenant for life in possession and the payment off of a mortgage upon the inheritance by a tenant for life in remainder. The presumption is in both cases that the charge is kept alive. In my judgment the onus is on those who say that it is not the intention to keep the charge alive to establish it. In the present case there is not sufficient evidence to displace the presumption and to show that there was not that intention. I therefore answer the question by saying that the plaintiff ought to pay to the defendant Marion Chesters the sum which Colin Flint Chesters paid to discharge the mortgage debt due to the Royal Exchange Assurance.

Solicitors: *Nash, Field & Co., for J. P. Whittingham,*

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(1) 2 Sim. & St. 364, 369.

Nantwich; Cunliffe, Blake & Mossman, for Martin & Dixon, Nantwich; Gibson & Weldon, for Whiteley & Bevan, Nantwich; Robinson & Bradley, for A. E. Whittingham & Son, Nantwich; Treasury Solicitor.

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1934
CHESTERS, *In re.*
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J. L. D.

FORSTER *v.* WILLIAMS DEACON'S BANK, LIMITED.

[1933. F. 1483.]

BENNETT J.
1934
Oct. 12, 15.

Will—Appointment of new trustee—Bank appointed managing trustee and custodian trustee—Validity—Remuneration—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 4.

A banking company, insurance company, or body corporate, duly qualified to act as custodian trustee, is not precluded from combining the two offices of custodian trustee and managing trustee, and is entitled to receive the remuneration which the Public Trustee would be entitled to receive under the provisions of sub-s. 3 of s. 4 of the Public Trustee Act, 1906.

WITNESS ACTION.

THE following facts are taken from his Lordship's judgment:—

The plaintiffs in this action are Mrs. Lilly Forster and Mrs. Milly Olga Bertha Sinelnikoff, her daughter, and the defendants are Williams Deacon's Bank, Ld. The plaintiffs are beneficiaries under the will of the late Mr. Philip Ziegler and the defendants are the trustees of his will, and the question between the parties is whether the defendants are entitled to charge the capital and income of the trust estate with the same fees as those to which the Public Trustee would be entitled if he were custodian trustee of the testator's will.

The plaintiffs say that the defendants are not entitled so to charge the trust estate; the defendants say that they are entitled to do so. There is no dispute of fact between the parties. The question is entirely a question of law.

The testator made his will on March 8, 1879, and died on September 16, 1880. The will contains no power for any trustee to charge remuneration for his services as a trustee.

On May 31, 1932, Mr. T. P. Ziegler, a son of the testator, was the sole trustee of the testator's will. He desired to be discharged, and on that day he and the defendants were parties to a deed of appointment whereby the defendants were appointed trustees. The deed, after reciting the will and the various appointments of new trustees which had been made since the testator's death and the state of the residuary trust fund, contains these operative provisions :

(1.) In exercise of the power for this purpose conferred by the Trustee Act, 1925, and by the Public Trustee Act, 1906, and of all other powers him hereunto enabling the present trustee hereby appoints the bank to be (*a*) sole managing trustee of the said will in the place of the present trustee and (*b*) custodian trustee of the said will.

(2.) The bank while acting as trustee of the said will shall be treated not only as a managing trustee but separately as custodian trustee with such functions duties and powers as appertain to a custodian trustee under s. 4 of the Public Trustee Act, 1906, and may act as such managing trustee and custodian trustee respectively by its proper officer or officers.

(3.) The bank while acting as custodian trustee of the said will shall be entitled to receive by way of remuneration for its services as such trustee out of the property subject to the trusts of the said will such fees as would for the time being be chargeable by the Public Trustee if he were custodian trustee of the said will.

(4.) The bank hereby consents to act as sole managing trustee and as custodian trustee of the said will.

Two of the beneficiaries commenced an action against the bank for a declaration that the defendants were not entitled to any remuneration, whether out of the capital or the income of the trust property, for acting as trustees.

Spens K.C. and *A. Guest Mathews* for the plaintiffs. The bank have no power to charge for their services. They cannot receive remuneration without an application being made to the Court. The document purports to appoint one and the same person custodian trustee and managing trustee. The appointment has no effect, as, under the Public Trustee Act, the custodian trustee must be different from the managing trustee. The question therefore arises whether, having regard to the provisions of s. 4 of the Trustee Act, 1906 (1),

(1) Sect. 4: "(2.) Where the Public Trustee is appointed to be custodian trustee of any trust—

(*a*) The trust property shall be transferred to the custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act, 1893;

(*b*) The management of the trust property and the exercise of any power or discretion exerciseable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees);

(*c*) As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustee shall have free access thereto and be entitled to take copies thereof or extracts therefrom;

(*d*) The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but, unless he so concurs, the custodian trustee shall not be liable for any act or default on the part of the managing trustees or any of them;

(*e*) All sums payable to or out of the income or capital of the trust property shall be paid to or by the custodian trustee: Provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application thereof and shall not be answerable for any loss or misapplication thereof;

(*f*) The power of appointing new trustees, when exerciseable by the trustees, shall be exerciseable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the court for the appointment of a new trustee as any other trustee;

(*g*) In determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee. . . .

(3.) The provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee."

the bank can hold the two offices. The plaintiffs challenge what has been done as being an attempt to appoint the same corporation custodian trustee and managing trustee without making an application to the Court under s. 42 of the Trustee Act, 1925.

John Bennett for the defendants. There is nothing in law to prevent the custodian trustee from holding the two offices at the same time, each with an independent duty and liability. Unless the statute either expressly or of necessity makes it impossible for the same person to hold the two offices, there is nothing which makes it impossible for the same person to combine two different sets of duties and liabilities.

Spens K.C. in reply. In order that there may be a valid custodian trusteeship the custodian trustee must be a different person from the managing trustee.

BENNETT J. [after stating the facts, continued :] It is under the provisions of the deed of May 31, 1932, that the defendants claim the right to receive the remuneration.

The plaintiffs concede that the deed was effective to appoint the defendants trustees of the will and to discharge the appointor from the office of trustee. Their contention is that there is no power to appoint a single trustee to be a custodian trustee and that it is a necessary consequence of the language of the Act of Parliament creating the office of custodian trustee and defining and laying down the duties appertaining to that office that there shall be another person or persons acting as an ordinary or managing trustee along with the custodian trustee ; and that accordingly, since the deed of May 31, 1932, appointed a single trustee only, that trustee cannot be a custodian trustee.

The Act on which the question depends is the Public Trustee Act of 1906, which by s. 1 establishes the office of Public Trustee. Sect. 2 lays down the circumstances in which the Public Trustee may, if he thinks fit, act. Sub-s. 1 of that section is in these terms : " Subject to and in accordance with the provisions of this Act and rules made thereunder, the public trustee may, if he thinks fit—(*a*) act

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in the administration of estates of small value; (*b*) act as custodian trustee; (*c*) act as an ordinary trustee; (*d*) be appointed to be a judicial trustee; (*e*) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870." Sub-s. 2 provides: "Subject to the provisions of this Act, and to the rules made thereunder, the Public Trustee may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed in pursuance of this Act, and shall have all the same powers, duties, and liabilities, and be entitled to the same rights and immunities and be subject to the control and orders of the court, as a private trustee acting in the same capacity."

Sect. 4 provides for the appointment of the Public Trustee as custodian trustee and defines his duties when so appointed. The terms are set out as follows in sub-s. 2.

[His Lordship read sub-s. 2, paras. (*a*) to (*g*), and sub-s. 3, and continued:]

Sect. 5 of the Act lays down the cases in which the Public Trustee may be appointed to be an ordinary trustee. Under the Public Trustee (Custodian Trustee) Rules, 1926, it is conceded that the defendants are qualified to act as custodian trustee.

Mr. T. P. Ziegler, the sole trustee of the will of the testator on May 31, 1932, was the person who had the power to appoint new trustees of the will, and, as I have already said, the defendants were qualified to be appointed custodian trustee of the will. I think it is quite true, as the defendants argued, that s. 4 of the Public Trustee Act, 1906, is framed on the view that there will, in addition to the Public Trustee acting as custodian trustee, be another person or other persons as a managing trustee or managing trustees of the trust instrument.

In my judgment it is quite clear that the Public Trustee, while holding the appointment of custodian trustee, can also be a managing trustee with other persons acting with him as managing trustees, and if he were so appointed, when those associated with him as managing trustees had

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for any reason ceased to be managing trustees, I can find no provision of the Public Trustee Act which prohibits the Public Trustee from continuing to act as a managing trustee while retaining the office of custodian trustee; and, that being so, it would not seem to me to be the necessary consequence of the language of s. 4 of the Public Trustee Act, that there must always be some person or persons associated with the Public Trustee as managing trustee to enable the Public Trustee to act as custodian trustee. Therefore as I can find no express prohibition in the section preventing the Public Trustee from holding both offices I see no reason why I should imply into it a prohibition against a banking or insurance company or body corporate, duly qualified to act as custodian trustee, holding both offices, or disentitling them to receive the remuneration which the Public Trustee would be entitled to receive under the provisions of sub-s. 3 of s. 4.

On these grounds the basis of the plaintiffs' action has, in my judgment, no existence and, therefore, I dismiss it with costs.

Solicitors: *C. S. Tomlinson; Routh, Stacey & Castle, for Orford & Sons, Manchester.*

J. L. D.

ERRATUM.

[1934] Ch. Volume-Index—Table of Cases Reported.

In re Hawksley's Settlement. Black *v.* Tidy.

The reference to this case should be 384.

In re SIGSWORTH.

BEDFORD *v.* BEDFORD.

[1934. S. 949.]

CLAUSON
J.
1934
Oct. 5.

Public Policy—Murderer disqualified from benefiting under Victim's Intestacy.

The rule of public policy which precludes a sane murderer from taking any benefit under his victim's will precludes him also from taking any benefit under the trusts declared by the Administration of Estates Act, 1925, s. 46, of the residuary estate of his victim in case of intestacy.

The views expressed by Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, 156 and by Farwell J. in *In re Pitts* [1931] 1 Ch. 546, 550 preferred to the view expressed by Joyce J. in *In re Houghton* [1915] 2 Ch. 173, 177 that the rule of public policy cannot contravene the positive provisions of the statute law.

ADJOURNED SUMMONS.

Mary Ann Sigsworth by her will dated July 31, 1911, left the whole of her property (of considerable value) to her son Thomas Bedford Sigsworth.

On September 23, 1933, an inquest was held at Frome, in the county of Somerset, touching the death of the testatrix, at which a verdict was returned that she died some time between September 17 and September 21, 1933, that the cause of her death was fracture of the spine caused by her son Thomas Bedford Sigsworth, and that some time between those dates he murdered the testatrix.

By another verdict of the same date returned at the inquest touching the death of Thomas Bedford Sigsworth, it was found that he died some time between September 18 and September 21, 1933, and that he feloniously killed himself.

Thomas Bedford Sigsworth, having by his will made in 1910 left the whole of his property to his father and his mother, the testatrix, both of whom predeceased him, therefore died intestate.

On November 17, 1933, letters of administration to the respective estates of the testatrix and her son were granted to the plaintiff, Thomas Edwin Bedford, the brother of the testatrix.

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Thomas Bedford Sigsworth left him surviving, besides the plaintiff, his maternal uncle, and a maternal aunt, a paternal uncle and aunt and descendants of another paternal aunt who had died in 1910.

This summons was taken out by the plaintiff, the maternal aunt and the paternal uncle and aunt of Thomas Bedford Sigsworth being made defendants: and the questions raised were (1.) whether Thomas Bedford Sigsworth became entitled to the residuary estate of his mother, the testatrix under her will; or, if he did not, (*b*) whether he became entitled under the Administration of Estates Act, 1925, to her estate as to which she died intestate.

It was not disputed that Thomas Bedford Sigsworth by murdering his mother had become disqualified from claiming any benefit under her will.

L. W. Byrne for the plaintiff. It is submitted that it is questionable whether the findings of fact by the coroner's jury at the inquests are admissible as evidence of those facts in this Court. In *Bird* v. *Keep* (1) the Court of Appeal refused to admit in evidence the findings of a coroner's jury as to the cause of the death of a workman upon a claim under the Workmen's Compensation Act, 1906.

Hon. Trevor Roberts for the defendant, Beatrice Wilson Bedford, the maternal aunt of Thomas Bedford Sigsworth. The same principle of public policy which precluded Thomas Bedford Sigsworth from claiming to benefit under his mother's will applies equally to preclude him from claiming to benefit under her intestacy, and he is incapable of taking as her next of kin under the provisions of s. 46 of the Administration of Estates Act, 1925. This view is supported by a statement of the law made by Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association* (2), and the same view was taken by Farwell J. in *In re Pitts* (3): see also statement by Sir Samuel Evans P. in *In the Estate of Crippen* (4) and *In the Estate of Hall.* (5)

(1) [1918] 2 K. B. 692.
(2) [1892] 1 Q. B. 147, 156.
(3) [1931] 1 Ch. 546, 550.
(4) [1911] P. 108, 112.
(5) [1914] P. 1.

In the particular circumstances of this case, Thomas Bedford Sigsworth is rendered incapable of taking any benefit owing to the death and intestacy of his mother brought about by his own crime. Further, the distribution of her estate under the statute must be upon the footing that the son had never been born, with the result that her estate passed to her brother, the plaintiff, and the defendant Beatrice Wilson Bedford, her sister.

Milner Holland for the defendants, the paternal uncle and aunt of the testatrix. The murder of the testatrix by her son does not justify the Court in disregarding the statute regulating the descent of her estate on her death intestate. Sect. 46 of the Administration of Estates Act, 1925, is peremptory; it says: " The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—". Then by virtue of sub-s. 1 (ii.), in the events which happened, her son became entitled to her residuary estate. This view received the support of Joyce J. in *In re Houghton* (1), in which he expressed his approval of the reasoning in an American case of *Carpenter's Estate* (2), where it was decided that the murder of his father by a son did not justify the Court in disregarding the statute of descents under which the son inherited as his father's heir.

CLAUSON J. In my opinion the findings of fact by the coroner's jury at the inquests held upon the respective deaths of the testatrix and her son are not admissible in this Court as evidence of those facts. In the absence of such evidence as I can accept in this Court, and in the absence of some of the parties interested, I am not prepared to decide either that Thomas Bedford Sigsworth murdered his mother or that she died before him: but I am willing, for the guidance of the administrator, to decide the question of law which arises if Thomas Bedford Sigsworth murdered his mother and also died before him; but to decide only on that assumption. The administrator, if he acts on my decision, will take the

(1) [1915] 2 Ch. 173, 177.

(2) (1895) 50 Am. St. Rep. 765.

risk that the assumption of fact may conceivably hereafter turn out to be erroneous.

There can be no question, nor has it been disputed, that the claim of the plaintiff, as the personal representative of the son, to the estate of the mother under her will is bound to fail by reason of the well settled principle that public policy precludes a sane murderer from taking a benefit under his victim's will. The result of that must be that the testatrix's estate which she left to her son was undisposed of at her death and passed, as upon her intestacy (subject to the question with which I proceed to deal), in accordance with the provisions of s. 46 of the Administration of Estates Act, 1925.

The question, however, which I have to decide is whether the principle grounded on public policy which prevents a sane murderer from benefiting under the will of his victim applies with equal force to the case of the victim dying intestate so as to preclude the murderer (or his personal representative) from claiming, under the provisions of s. 46 of the Act, the property in respect of which his victim died intestate.

In my judgment the principle of public policy which precludes a murderer from claiming a benefit conferred on him by his victim's will precludes him from claiming a benefit conferred on him, in case of his victim's intestacy, by statute. The principle (to quote the language of Fry L.J.) must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it. This view of the law is adopted by Fry L.J. in *Cleaver's* case (1) and by Farwell J. in *In re Pitts* (2), and must in my judgment prevail over the view taken by Joyce J. in *In re Houghton* (3); and whether or not the opinions so expressed are binding on me, I agree with them and adopt them as my own.

The further question may arise whether the effect of my

(1) [1892] 1 Q. B. 147, 156.
(2) [1931] 1 Ch. 546, 550.
(3) [1915] 2 Ch. 173, 177.

so deciding will be that the son should be treated as struck out of the Act, with the result of letting in the testatrix's brother and sister as the persons entitled to her estate under cl. (v.) of sub-s. 1 of s. 46 of the Act, or whether her estate passed as bona vacantia to the Crown. In the absence of His Majesty's Attorney-General, that question cannot now be decided; but I will order that the plaintiff be at liberty to add the Attorney-General as a defendant to the summons for the purpose of enabling him to claim the mother's estate on behalf of the Crown.

Solicitors for all parties: *C. V. Young & Cowper, for H. W. Faulkner, Frome.*

H. C. H.

In re ALEXANDER DREW & SONS, LIMITED.

EVE J.
1934
Oct. 18; *Nov.* 16.

(No. 00234 of 1934.)

Company — Winding-up — Private company — Undistributed profits — Assessment of company to members' surtax—Apportionment of liability—Payment of surtax by liquidator—Distribution of surplus—Surtax paid to be brought into account—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 21; *Sch. I. para.* 8—*Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 31, *sub-ss.* (3), (4).

A private company to which s. 21 of the Finance Act, 1922, applied, having gone into voluntary liquidation, there was a large surplus for distribution amongst the holders of preference and ordinary shares. The Special Commissioners of Income Tax having given a direction under that section that the surplus must be deemed to be the undistributed income of the members for the purposes of surtax, assessed the company to surtax for the previous financial year, and apportioned the tax among the members in accordance with their holdings, some being liable to pay surtax, and others not so liable. Notices of the charge were served upon the members liable, but none of them elected to pay the tax within the prescribed period of twenty-eight days, and notice having then been served upon the company, the liquidator paid the tax so assessed:—

Held, that in distributing the balance of the surplus among the members the liquidator, having regard to Sch. I., para. 8, of the Finance Act, 1922, must bring into account the surtax so paid against the amounts receivable by the members in respect of their incomes from their holdings of preference and ordinary shares in the company.

SUMMONS.

The company, Alexander Drew & Sons, Ld., was incorporated in 1906 as a private company for the purpose of acquiring and carrying on a business of calico printers then carried on by Alexander Drew, Daniel Drew, and Thomas Auchterlonie Drew. Its original capital was 150,000*l*, but at the date of the commencement of the winding-up of the company in 1929, the issued capital had been increased to 220,000*l*., divided into 140,000 ordinary and 80,000 5½ per cent. preference shares of 1*l*. each, fully paid.

At an extraordinary general meeting of the company held on January 29, 1929, a resolution was passed for the voluntary winding-up of the company, and this was duly confirmed on February 13, 1929, and H. W. Garnett was appointed liquidator.

At the date of the commencement of the winding-up the whole of the ordinary and preference shares of the company were held in ten separate holdings, some belonging to persons beneficially interested and the rest to trustees of two different wills, those of A. A. Drew and T. A. Drew respectively, all members of the Drew family.

At the commencement of the winding-up the company was solvent, the liquidator then paid all the debts and there was a large surplus for distribution among the preference and ordinary shareholders. The company was one to which s. 21 of the Finance Act, 1922, as amended by s. 31 of the Finance Act, 1927, relating to assessment of super tax on undistributed income, applied, in that it was under the control of not more than five persons, and was not a subsidiary company or a company in which the public were substantially interested.

On October 16, 1929, the Special Commissioners of Income Tax gave a direction under s. 21 of the Finance Act, 1922,

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addressed to the liquidator to the effect that the income of the company for the period from March 31, 1928, to February 13, 1929, not having been distributed should for the purposes of assessment to surtax be deemed to be the income of the members, and that the amount thereof should be apportioned amongst the members.

The Special Commissioners subsequently computed the actual income from all sources of the company for the purposes of assessment to surtax for the above period at 52,911*l.*, and under the First Schedule, para. 8, of the Act proceeded to apportion that amount amongst the members in accordance with their holdings. Two members, Mr. John Malcolm Drew and Mrs. Nina Campbell Macfie were assessed to surtax both in respect of shares held by them in their own right and shares held by them as trustees of the wills of Alan Appleby Drew and Thomas Auchterlonie Drew respectively. The liquidator of the company contended that the amounts so apportioned in respect of shares held in trust under the above mentioned wills, having been settled, were capital and not income, and appealed to the Special Commissioners, who confirmed the apportionment. On a case stated for the opinion of the King's Bench Division, Finlay J. held that the appeal of the company failed, and that the decision of the Special Commissioners must be confirmed. The Finance Act, 1922 (12 & 13 Geo. 5, c. 17), provides as follows :—

Sect. 21. With a view to preventing the avoidance of the payment of super tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows :

(1.) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to the fifth day of April, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members. . . . .

(2.) Any super tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company, shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company, and all the provisions of the Income Tax Acts and any regulations made thereunder relating to super tax assessments and the collection and recovery of super tax shall, with any necessary modification, apply to super tax assessments, and to the collection and recovery of super tax charged under this section.

(3.) A notice of charge to super tax under this section shall in the first instance be served on the member of the company on whom the tax is assessed, and if that member does not within twenty-eight days from the date of the notice elect to pay the tax a notice of charge shall be served on the company and the tax shall thereupon become payable by the company. . . . .

(4.) Any undistributed income which has been assessed and charged to super tax under this section shall, when subsequently distributed, be deemed not to form part of the total income from all sources for the purposes of super tax of any individual entitled thereto. . . . .

. . . .

(8.) The provisions contained in the First Schedule to this Act shall have effect as to the computation of the actual income from all sources of the company, the apportionment thereof amongst members of the company, and otherwise for the purpose of carrying into effect, and in connection with, this section.

Schedule I of the Finance Act, 1922, provides: (para. 8). The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members, and the income as apportioned to each member shall, for the purposes of super tax, be deemed to represent his income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorized to require and shall be deemed to be the highest part of that income.

By the Finance Act, 1927, s. 31, sub-s. 3 (amending sub-s. 6 of the above s. 21), the latter section shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested.

Sub-sect. 4: Where an order has been made or a resolution passed for the winding-up of a company to which the said s. 21 [of the Finance Act, 1922] applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company, and, as respects that period and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, the said section shall apply as if the words "within a reasonable time" in sub-s. (1) of the said section were omitted therefrom.

For the purposes of assessment to surtax under the above s. 21 as so amended there was deducted from the income attributable to the preference shares the sum of 3000*l.* and from that attributable to the ordinary shares the sum of 9800*l.* in respect of dividends paid on the preference and ordinary shares respectively, leaving a net total figure of 39,811*l.* The surtax chargeable in respect of the net total sum was in due course assessed on the members of the company and notices of the charge were served upon them. None of them elected to pay the said tax within the period of twenty-eight days, and a notice of charge was served on the company. The liquidator in pursuance of this notice paid out of the assets of the company the amount of surtax so assessed, which was 9129*l.* 0*s.* 3*d.*

After payment of all debts and return of paid up capital to the members, and the amount of the fixed dividend on the preference shares, and the surtax, there was a considerable surplus available for distribution.

The liquidator thereupon took out this summons to determine the question, which had been raised, (1.) whether the sum of 9129*l.* 0*s.* 3*d.* paid out of the assets of the company by the liquidator in discharge of the surtax assessed upon members of the company under s. 21 of the Finance Act, 1922 (as amended by s. 31 of the Finance Act, 1927), in respect of income (*a*) ought to be treated as a liability of the company payable before the ascertainment of the amount available for distribution among its members in the winding-up; or (*b*) ought to be brought into account in such distribution against the amounts receivable by the holders of the Preference and Ordinary Shares in respect of the income of which the surtax was assessed in the proportions in which the same was assessed; or (*c*) how otherwise the payment of surtax ought to be dealt with.

The respondents to the summons were selected as representing different interests: (*a*) those members who were liable to surtax: (*b*) those who were not liable to surtax, or if liable, then on a smaller income.

D. Ll. Jenkins for the liquidator.

C. R. R. Romer for respondents liable to surtax on their incomes from shares in the company.

The liability to the Inland Revenue for surtax under s. 21 of the Act of 1922, is that of the company; the Revenue could not sue any member of the company for it. The liquidator is entitled to deduct the surtax from the sum which he distributes. There is nothing in the Act which says that the members are to be liable to the company if the company pays the surtax.

J. H. Stamp, for respondents not so liable.

The company having by its own act retained the income of members is bound to pay the surtax upon it. The fund is, by virtue of s. 31, sub-s. 4, of the Finance Act, 1927, immediately available for distribution, and in that distribution the payment by the company of members' surtax ought to be brought into account.

The equitable maxim, "Qui sentit commodum sentire debet et onus" is applicable. The surtax must be treated as a liability attaching to the vested right to which it applies. Nothing could be more inequitable than that the large income of one shareholder should impose a liability on the smaller income of another shareholder. After the winding-up has begun, the surplus to be distributed has ceased to be the company's money and has become the shareholders' money. The exact amount payable in respect of each share is known and should be brought into account.

C. R. R. Romer replied.

Cur. adv. vult.

1934. Nov. 16. EVE J. The applicant is the liquidator in the voluntary winding-up of Alexander Drew & Sons, Ld., a private company to which s. 21 of the Finance Act, 1922, applies. The respondents are shareholders representing some members liable to pay surtax on a higher scale than others and some not liable to pay it at all. They adopt different views as to the answers to be given to the questions submitted by the liquidator to the Court.

Sect. 21 was passed with a view to preventing the avoidance of the payment of super tax through the withholding from distribution of income of a company which would otherwise be distributed. It enacts that where it appears to the Special Commissioners that any company to which the section applies has not within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members in such manner as to render the amounts distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super tax a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may by notice in writing to the company direct that for purposes of assessment to super tax the said income of the company shall for the year or other period specified in the notice be deemed to be the income of the members and the amount thereof shall be apportioned amongst the members.

The company was incorporated on March 30, 1906, and on January 29 and February 13, 1929, passed and confirmed a special resolution for voluntary winding-up. The issued capital at that date was 220,000*l.* in 1*l.* shares, of which 80,000*l.* are preference and 140,000*l.* ordinary shares. The company has been solvent throughout, the creditors have all been paid, the preference shareholders have been repaid their capital with interest thereon at 6 per cent. per annum down to the winding-up, and a surplus remains for distribution amongst the ordinary shareholders.

On October 18, 1929, the Special Commissioners gave a direction to the liquidator under s. 21 to the effect that the income of the company for the period from March 31, 1928, to February 13, 1929, should for the purposes of assessment of surtax be deemed to be the income of the members and that the amount thereof should be apportioned amongst the members. The Commissioners subsequently computed the actual income of the company from all sources for the purposes of assessment to surtax under this s. 21, for the period in question at 52,911*l.* and on May 16 gave the liquidator notice of the apportionment made. An appeal from the apportionment was finally disposed of by a judgment of Finlay J., dated June 13, 1932. The 52,911*l.* was apportioned as to 3845*l.* 9*s.* 7*d.* to the members in respect of preference shares, and as to 49,065*l.* 10*s.* 5*d.* to the members in respect of ordinary shares.

For the purposes of assessment to surtax under s. 21 there was deducted from the two above-mentioned sums the sums of 3000*l.* and 9800*l.*, in respect of dividends paid on the preference and ordinary shares respectively. These deductions left a net figure of 39,811*l.*, and the surtax charged in respect of this net amount, 9129*l.* 0*s.* 3*d.*, was in due course assessed

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on the members of the company and notices of the charge were served upon them. None of the members elected to pay the tax (s. 21, sub-s. 3), and in due course a notice of charge was served on the company and the tax thereupon became payable by the company. It was paid by the liquidator out of the assets of the company, and the question I am now called upon to decide is whether this sum of 9129*l.* 0s. 3*d.* paid out of the assets of the company in discharge of the surtax assessed upon members, ought to be treated as a liability of the company payable before the ascertainment of the amount available for distribution amongst its members in the winding-up, or ought to be brought into account in such distribution against the amounts receivable by the holders of the preference and ordinary shares the income of which was assessed to surtax in the proportions in which the same was assessed.

In my opinion, the second of the two alternatives is the proper one to adopt; the other would be to apply assets distributable amongst all the members or a particular class of them in part payment of moneys charged upon and payable by other members, and this, in my opinion, would be to disregard the express provisions in para. 8 of the First Schedule to the Act, that the apportionment is to be made in accordance with the respective interests of the members and that the income as apportioned to each member is for the purposes of surtax to represent his income from his interest in the company for the year or other period. Accordingly, I answer the question by saying that the second method is the right way of distribution. The costs of all parties will be costs in the winding-up.

Solicitors: *Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester; Cunliffe, Blake & Mossman, for Tatham, Worthington & Co., Manchester.*

H. L. L.

FARWELL J.

1934

Nov. 13.

KISCH *v.* HAWES BROTHERS, LIMITED.

[1934. K. 478.]

Tenant for Life—Lease—Death of grantor—Validity of lease—Onus of proof—Protection of lessee—Plea of possession—Forfeiture—Rules of the Supreme Court, Order XXI., *r.* 21*—Leases Act,* 1849 (12 *&* 13 *Vict. c.* 26), *and* 1850 (13 *&* 14 *Vict. c.* 17)*—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 7, 8, 54*—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 152, *sub-ss.* 1, 2, 6; *s.* 154.

A tenant for life by deed granted a lease of certain premises to the defendants to take effect more than twelve months after its date. The grantor died, and her successor sued for possession of the premises. The defendants pleaded possession under Order XXI., r. 21, but were allowed to amend their defence so as to rely on the lease granted to them by the plaintiff's predecessor and claim protection under s. 152 (1) of the Law of Property Act, 1925:—

Held, that the plea of possession denied plaintiff's title, and therefore that was a forfeiture which entitled her to re-enter.

Held, further, that assuming there had been no forfeiture, it was for the defendants to show that the lease granted to them was valid and within the power of the then tenant for life to grant. This they had failed to do, and the plaintiff was therefore entitled to the relief claimed.

ACTION.

The plaintiff, Mrs. Sybil Kisch, sued for possession of premises known as No. 160 High Street, Notting Hill Gate.

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(1) Sect. 152: "(1.) Where in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease (in this section referred to as an invalid lease) is granted, which by reason of any failure to comply with the terms of the power is invalid, then—

(*a*) as against the person entitled after the determination of the interest of the grantor to the reversion; or

(*b*) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease;

the lease, if it was made in good faith, and the lessee has entered thereunder, shall take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power: Provided that a lessee under an invalid lease shall not, by virtue of any such implied contract, be entitled to obtain a variation of the lease if the other persons who would have been bound by the contract are willing and able to confirm the lease without variation.

The premises were held by the defendants under a lease for twenty-one years granted to them by the plaintiff's predecessor in title, who was herself a tenant for life under the will of Mr. John Ramus. Mr. John Ramus acquired the freehold in the property in 1900, and he remained the owner till his death. During his lifetime he granted a lease to Messrs. Hawes Bros., the immediate predecessors of the defendant company, of the premises in question, which comprised a shop, dwelling-house, and yard. Messrs. Hawes Bros. and the succeeding limited company carried on a successful business as grocers on those premises.

By the lease dated May 2, 1899, and made between John Ramus and the two Hawes brothers, the lessor granted to the lessees "all that shop messuage or dwellinghouse situate and being No. 160 High Street Notting Hill in the County of Middlesex," and all the passages, etc., "to have and to hold the said shop messuage and premises hereby demised or expressed so to be unto the lessees for the term of 21 years from the 25th day of December 1899" at the yearly rental of 150*l*. The lease contained full repairing and other covenants and a covenant against assignment, under-letting, or parting with possession of the premises without the consent of the lessor. So far as this lease was concerned, there was no question; Mr. John Ramus as absolute owner was entitled to let the property as he pleased. Mr. John Ramus died on April 19, 1904, and by his will dated April 12, 1902, he appointed his wife Fanny Ramus and Mr. Emanuel Simmons

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(2.) Where a lease granted in the intended exercise of such a power is invalid by reason of the grantor not having power to grant the lease at the date thereof, but the grantor's interest in the land comprised therein continues after the time when he might, in the exercise of the power, have properly granted a lease in the like terms, the lease shall take effect as a valid lease in like manner as if it had been granted at that time."

"(6.) Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the interest of the grantor or otherwise, cannot have effect and continuance according to the terms thereof independently of the power, the lease shall for the purposes of this section be deemed to have been granted in the intended exercise of the power although the power is not referred to in the lease."

to be executors and trustees thereof, and he devised (inter alia) the premises leased to the Hawes Bros. to his trustees upon trust for the said Fanny Ramus during her life, and from and after her decease upon trust for the plaintiff during her life without power of anticipation, and from and after the death of the plaintiff upon trust to sell the same and to stand possessed of the net proceeds of such sale after the payment of the expenses thereof in trust for the children of the plaintiff as therein mentioned. Mrs. Ramus died on October 9, 1933, and on her death the plaintiff became tenant for life of the property in question. Thereupon the terms upon which the premises were in the occupation of the defendant company were inquired into, and as a result the plaintiff claims that the defendants are not in occupation of the premises under any subsisting valid lease and that she is therefore entitled to possession.

What happened during the lifetime of Mrs. Ramus was this. In August, 1919, at a time when the prior lease was still in existence, because it did not determine until Christmas of 1920, Messrs. Hawes were minded to turn their business into a limited company, and apparently it was thought convenient to have a new lease—as from December 25, 1920—granted at once direct to the company. Accordingly, on August 2, 1919, Mr. Thomas Hawes wrote to Mrs. Ramus: "For family reasons we are turning our firm into a private limited company, and our solicitor thinks it would be better if we had the new lease for 160 High Street executed now, and I can make an exact copy of the present lease for twenty-one or twenty-eight years to run on from the termination of the present one at Christmas 1920 if you are agreeable, and if you will let me know I will at once put the matter in hand. I hope you have now regained your usual health." Mrs. Ramus took no legal advice in the matter, but she came to an arrangement with Mr. Hawes under which she agreed to let the premises to Messrs. Hawes Bros., Ld., the defendants, for a term of twenty-one years as from December 25, 1920, at a rent of 160*l*. a year. That is to say that the existing lease was to continue until its expiration, and then the new lease was to become operative immediately upon the expiration of the existing lease. Except that the rent was increased to 160*l.*, there was no difference in the two leases. The defendants continued in occupation of the premises up till Christmas, 1920, under the original lease, and the defendant company continued in occupation, as they claim, under the second of those two leases; the rent was paid to Mrs. Ramus, and during her lifetime no question arose.

After the death of Mrs. Ramus matters were looked into, and the plaintiff claimed that the defendant company were not in occupation under any valid existing lease and asked them to give up possession. This the defendant company refused to do, and the plaintiff brought the present action for possession. The defendants being in possession pleaded that possession in the first paragraph of their defence, to which the plaintiff at once replied that this denied her title and therefore was a ground of forfeiture of the lease and gave her the right to re-enter. At the hearing of the action leave to amend the defence was given, so that the words " under the lease hereinafter referred to " were added at the end of the first paragraph.

Fergus Morton K.C. and *G. D. Johnston* for the plaintiff. There has been a forfeiture by reason of denial of plaintiff's title and she is entitled to re-enter: cf. *Barton* v. *Reed.* (1) Assuming there was no forfeiture the lease granted by Mrs. Ramus is invalid, since it is one which was to take effect more than twelve months from its date, and therefore s. 152, sub-ss. 1, 2 and 3, of the Law of Property Act, 1925, have no applicability. See the judgment of Kekewich J. in *In re Newell and Nevill's Contract.* (2) If the lease is invalid it cannot be made valid: *King* v. *Bird.* (3) If this is wrong then 160*l.* was not the best rent. Under the Settled Land Acts the tenant for life is a trustee and s. 54 of the Settled Land Act, 1882, does not assist the lessee where the lease on the face of it is in contravention of the Act. The defendants say the lease takes effect in equity, and it is for them to show that the rent reserved was the best rent.

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(1) [1932] 1 Ch. 362, 367.
(2) [1900] 1 Ch. 90, 94.
(3) [1909] 1 K. B. 837, 848.

[FARWELL J. The lease of 1919 was a lease which Mrs. Ramus could not have granted, and is on the face of it an invalid lease: the burden of proof is therefore on the defendants.]

A. C. Nesbitt for the defendants. The first point is that the lease of 1919 was to take effect in possession and was granted under powers conferred by statute. The whole purpose of s. 152 of the Law of Property Act, 1925, is that where there has been an invalid lease owing to certain circumstances it is validated by the operation of the section. I submit that sub-s. 2 of s. 152 means that if Mrs. Ramus lived after September 29, 1919, which she did, she could have granted a lease on December 25, 1920. As regards best rent I rely on s. 54 of the Settled Land Act, 1882. There are many cases which show that the "best" rent is not necessarily the "highest" rent: *Hurrell* v. *Littlejohn.* (1)

FARWELL J. This is an action which gives rise to a curious question between the plaintiff, who is now tenant for life, and the defendants, who are in occupation of certain premises in Notting Hill under a lease which was granted by the plaintiff's predecessor, who was herself during her lifetime tenant for life.

[His Lordship stated the facts and continued:] The plaintiff, in her statement of claim, pleads her title to the property as tenant for life, and claims possession and mesne profits since October 9, 1933, that is to say, since the death of the prior tenant for life. The defendants put in a defence, and the first paragraph of that defence is in these terms: "The defendants are in possession of the premises No. 160 High Street Notting Hill Gate referred to in the statement of claim." That is how the defence was drawn; that is how the defence was delivered on July 13 of this year, and that is how the defence has stood, unaltered, down till to-day. For the effect of such a plea it is necessary to refer to Order XXI., r. 21. That Order is in these terms: "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends upon an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned." On that the plaintiff submits that she is entitled to re-enter on the ground that the first paragraph of the defence amounts to a denial of the plaintiff's title, and that a denial of the plaintiff's title by a tenant is a ground upon which a lessor is entitled to forfeit the lease. When the case was opened before me the defendants sought leave to amend their defence by adding to the end of the first paragraph the words "under the lease hereinafter referred to," and with some hesitation I permitted the defence to be amended accordingly; but in my judgment, notwithstanding the amendment, the defendants cannot escape from the result of their own plea. As soon as the defence was delivered on July 13, 1934, the plaintiff became entitled to forfeit the lease, and she made it plain on July 18, when the reply was delivered, that she was claiming the right to re-enter on that ground, and it is impossible in my judgment by amendment now to destroy the effect of what was done as soon as the defence was delivered. Accordingly, on that short ground, the plaintiff, in my judgment, is entitled to possession of the property, and to payment of the rent of 160*l.* a year under the then existing lease down to the forfeiture. As from that date the defendants have been in possession as trespassers, and the plaintiff is entitled to mesne profits and to an inquiry as to the mesne profits payable from July 13, 1934, down to the date of possession. That in itself is sufficient to dispose of this action.

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(1) [1904] 1 Ch. 689.

But another point has been taken and argued before me,

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and I think I ought to state quite shortly my view on it, because it may well be that this matter, which is of importance to the parties, may go elsewhere. The point taken is this: It is said that, assuming that there has been no forfeiture, nevertheless the plaintiff is entitled to succeed in this action, because the lease of October 9, 1919, was not such a lease as Mrs. Ramus, as tenant for life, could have granted. Under s. 7 of the Settled Land Act, 1882, provision is made for the grant of leases by tenants for life. Sect. 6 provides that the tenant for life may lease the settled land or any part thereof for any term not exceeding, in the case of such a lease as this, twenty-one years, and s. 7 provides: "Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date." Sub-cl. 2 provides: "Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case," and sub-cl. 4 provides: "A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence." It is said on behalf of the plaintiff that this lease is not such a lease as the tenant for life could effectually grant, because it is not a lease "to take effect in possession not later than twelve months after its date." That, on the face of it, would seem to be a good plea. This was a lease which was granted on October 9, 1919, and it was not to take effect until December 25, 1920. Obviously, therefore, it is not a lease made to take effect not later than twelve months after its date, and that being so, it is not such a lease as a tenant for life could grant so as to be binding on the persons entitled in reversion. Apart from any other question, that, on the face of it, would appear to entitle the plaintiff to claim possession of the property.

But it is said on behalf of the defendants that the plaintiff is not entitled to succeed on that ground because the defendants' rights are preserved and their position is safe-

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guarded by ss. 152 and 154 of the Law of Property Act, 1925. So far as s. 154 is concerned, its only relevance is that it makes the earlier section retrospective. [His Lordship read the relevant portions of s. 152, and continued:] It is said that here is a case where a lease has been granted which is invalid because of a failure to comply with the terms of the power, and that that being so, this section saves the lessees and entitles them, as against the plaintiff, to remain in occupation under it. It is worth notice that this s. 152 is a reproduction, in somewhat different language, of a similar section in the Leases Act of 1849. It is not necessary for me to refer to that Act in any detail, but it is noticeable that one of the preambles to that Act is in these terms: "And whereas leases granted in the intended exercise of such powers are sometimes invalid, as against the successors in estate of the persons granting the same, by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power." I find it difficult to suppose that the Law of Property Act, 1925, intended to cut down in any way the benefit given under it to lessees by the earlier Act, and therefore, it may be that section 152 applies to a case of this kind although I have felt some doubt about it. I do not however propose to decide that question, and for the purpose of this judgment I will assume that the lease which Mrs. Ramus purported to grant in October, 1919, is a lease to which s. 152 applies. But, even assuming that, the section, in my judgment, does not assist the defendants, and for this reason. It is essential, in my judgment, for the defendants to prove that apart from the fact that the lease is to take effect more than twelve months after its date it is otherwise such a lease as Mrs. Ramus could properly have granted on December 25, 1919, and in this respect s. 54 of the Settled Land Act, 1882, does not assist them.

*I have been referred to authorities for the proposition that the fact that the rent reserved is not the highest rent

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obtainable is not in itself sufficient to invalidate the lease. I am not concerned with that; I have no means of knowing whether this lease was granted at the best rent or not, and in my judgment it is for the defendants to show that they can properly claim the benefit of s. 152, and that they have not attempted to do.

Under those circumstances, in my judgment, the defendants have not brought themselves within the ambit of the section, because they have not shown what it was essential for them to show, that even if the lease is one which could be validated under s. 152 notwithstanding that it is a lease granted outside the twelve months, it was, apart from that, a proper lease in all other respects and one which the tenant for life could properly have granted. In the absence of such evidence, the defendants cannot rely upon s. 152.

Solicitors for the plaintiff: *P. S. Solomon, Archer & Co.*
Solicitors for the defendants: *Neve, Beck & Crane.*

R. A. Y.

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Referred to. In re YOUNG [1951] 1 Ch. 185

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[1934. R. 746.]

Administration — Intestacy — Advancement — Hotchpot — Money or property by way of Advancement or on Marriage of a child of Intestate paid or settled by Intestate—Appointment by Intestate in exercise of Special Power of share in marriage settlement funds in trust for children—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 47, *sub-s.* 1, *cl.* (iii).

Funds transferred by the trustees of a marriage settlement to a son in pursuance of an appointment in his favour made by his father in exercise of a special power of appointment amongst his children and of a surrender of the father's life interest, are not money or property by way of advancement paid to the son by the father within the meaning of s. 47, sub-s. 1, cl. (iii), of the Administration of Estates Act, 1925, and are not liable to be brought into account in or towards satisfaction of that son's share in the estate of the father upon the father's death intestate.

Even assuming the life interest of the intestate in the appointed share of the settlement funds surrendered by him to the appointee to be money or property paid by way of advancement within the meaning of clause (iii) aforesaid, in view of the fact that the value of that life interest to be brought into account under that clause has to be reckoned as at the date of the death of the intestate and therefore could be of no value, the surrender could have no effect upon the proposition first above stated.

ADJOURNED SUMMONS.

By a settlement dated May 9, 1889, made on the marriage of Charles S. Wentworth Reeve with his first wife (then Beatrice Annie Holden) a fund was settled, subject to successive life interests therein of the husband and wife, upon trusts for the issue of the husband as he should by deed or will appoint and subject to any such appointment in trust for the children of the husband who should attain the age of twenty-one years in equal shares.

By a deed poll dated May 19, 1919, the husband (hereinafter called "the appointor") in exercise of his special power under his marriage settlement, appointed that the settlement trustees should, from and after the decease of the survivor of himself and his said wife, stand possessed of one moiety of the settled trust fund in trust for his son John Talbot Wentworth Reeve.

By a memorandum in writing dated May 20, 1919, the appointor and his wife requested the settlement trustees to transfer and pay one-half of the moiety of the settled trust fund so appointed by the deed poll of May 19, 1919, to their son John Talbot Wentworth Reeve for his advancement and benefit and with a view to his transferring that one-fourth share of the settled trust fund to the trustees of a deed of settlement then intended to be made and which was on May 21, 1919, in fact made on the marriage of John T. Wentworth Reeve, who thereby settled his said one-fourth share in the trust fund subject to the trusts of the settlement of 1889. By the same deed of May 21, 1919, the appointor covenanted with the trustees thereof to transfer to them investments of such value as would bring the value of the investments representing his son's said one-fourth share so settled by him up to a total sum of 10,000*l.*

Accordingly, investments were transferred by the trustees of the 1889 settlement and the covenantor respectively to the trustees of the son John T. Wentworth Reeve's settlement of the total value of 10,232*l.*

On February 20, 1925, the said Beatrice Annie Reeve (the wife of the appointor) died. On December 31, 1925, the appointor by a deed poll surrendered to his son John T. Wentworth Reeve his life interest, then still subsisting under the 1889 settlement, in the other half of the moiety which he had appointed in favour of his son on May 19, 1919; and by the same deed the appointor appointed the then unappointed moiety of the trust fund subject to the 1889 settlement in trust for his daughters Margery B. Wentworth Reeve and Helen L. Wentworth Reeve (children by his said first wife) in equal shares and surrendered unto them his life interest in that moiety so appointed. And, accordingly, in February, 1926, the trustees of the 1889 settlement transferred to John T. Wentworth Reeve and to the two daughters Margery B. Wentworth Reeve and Helen L. Wentworth Reeve certain investments in satisfaction of those appointed shares; the value of each share so appointed being at the date of the appointor's death of the value of 4199*l.*

On September 6, 1933, the appointor (who in May, 1925, married his second wife and had issue by such marriage three children) died intestate, and letters of administration to his estate were granted to his widow, Maud Wentworth Reeve (his second wife) and the said John T. Wentworth Reeve.

The widow, as administratrix of the intestate's estate, accordingly took out this summons to which the said three appointees (children of the first marriage of the intestate) and the three children of his second marriage were defendants, raising questions whether, in the distribution of the estate of the deceased intestate, any and which of the interests of the defendants, the three children of the intestate by his first marriage to which they became respectively entitled under the said appointments and surrenders made by the intestate in their favour ought to be brought into account in pursuance of s. 47, sub-s. 1, cl. (iii), of the Administration of Estates Act, 1925, and whether the interest of the son John T. Wentworth Reeve under the covenant contained in his marriage settlement of May 21, 1919, ought to be brought into account in pursuance of the same section.

G. D. Johnston for the plaintiff.

Gover K.C. and *L. W. Byrne* for the appointees, John T. Wentworth Reeve and Margery and Helen Wentworth Reeve, children of the first marriage. As regards the settlement funds appointed by the intestate in favour of his son and two daughters, the wording of the new section, s. 47, sub-s. 1, cl. (iii) (1), differs from that of s. 5 of the Statute of Distribution of 1670. Under that section, in the distribution of the surplusage of the intestate's estate, children of an intestate had to bring into hotchpot any estate they had by settlement from the intestate or any advancements made by him in his lifetime by way of portion. Upon the proper construction of s. 47, it is essential that the money or property to be brought into account under the section should be money or property belonging to the intestate and that it was advanced by him as a provision for a child of his. The property in question, the funds subject to the trusts of the settlement of 1889, was not property of the intestate, but was property held by the trustees of a settlement under the trusts of which the children of the intestate had contingent interests, the interest of each being liable to be divested in favour of others of the class by the exercise on the part of the intestate of his power of appointing the funds amongst such one or more of them as he chose to select. That power of selection was the only interest the intestate had in the capital of the settled funds.

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(1) Sect. 47, sub-s. 1 (iii): "Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives."

Sir Gerald Hurst K.C. and *Ian Campbell* for the infant children of the second marriage of the intestate. The funds in question were paid to the intestate's children of the first marriage by way of advancement or (in the son's case) were settled for his benefit by the intestate within the meaning of s. 47 of the Act of 1925; and the appointed shares must be brought into account in the distribution of the intestate's estate. The expression "money by way of advancement paid by the intestate" in s. 47, sub-s. 1, cl. (iii), is not to be restricted to a payment made by the intestate in his lifetime, but the words of the clause are satisfied though the payment be made after the intestate's death, provided the payment has been secured in the lifetime of the intestate. In *Edwards* v. *Freeman* (1), which was decided while the old statute of 1670 was in force, it was held, in effect, that, so long as the provision for a child was secured by the intestate in his lifetime, the fact that payment was not made until after his death did not take the case out of the statute: a portion so secured must be brought into account to secure equality amongst the children. In that case, a husband by settlement on his marriage secured by his covenant portions for his daughters of the marriage payable at the age of eighteen or marriage. There was one daughter only; the husband survived his wife and married again and died intestate leaving issue of his second marriage. It was objected that the daughter of the first marriage being at the date of the intestate's death under the age of eighteen and unmarried, and consequently her portion not being then due, her interest under the settlement was a future and contingent interest and could not be an advancement within the meaning of s. 5: it was held

(1) (1727) 2 P. Wms. 435.

that the words of the section were general and notwithstanding that her title to her portion depended upon a contingency arising after the death of the intestate, the fact that it was secured in the intestate's lifetime was sufficient to bring it within the section. It is submitted that by an analogous process of reasoning, the intestate here by the exercise of his power of appointment did secure the payment of money to his son and daughters and that the principle of the case cited applies to the present case. The funds transferred in pursuance of the appointments are "money paid to such child by the intestate" within s. 47 of the new Act; because in point of fact the funds were taken out of the settlement of 1889 and transferred or paid to those children of the first marriage by virtue of the appointments and releases of the intestate's life interest. The section does not require that the intestate should make the payment personally or in a literal sense out of moneys of his own.

CLAUSON J. The intestate in this case, Mr. Charles Sydney Wentworth Reeve, died intestate on September 6, 1933, and the question arises, stating it in general terms, whether certain benefits obtained by a son and two daughters of his first marriage, in circumstances which I will refer to more particularly, must be treated as having been paid by way of advancement or settled by the intestate in or towards satisfaction of their shares and brought into account in accordance with the requirements of s. 47, sub-s. 1, cl. (iii) of the Administration of Estates Act, 1925.

I take first, for the sake of simplicity, the case of the two daughters Margery and Helen. The position of those daughters was this: The intestate had, on his first marriage, by the settlement of May 9, 1889, settled a very considerable sum on trusts for himself for life, and with an interest in certain events of a certain limited character for his first wife after his death. The first wife died on February 20, 1925, and I need not refer to her further. Subject to those life interests the fund was settled on the usual marriage trusts, but not for the children of the marriage, but for "his children," with the usual provision enabling him to appoint. He had made certain advances in favour of his son, with which for the moment I do not deal, but on December 31, 1925, one-half of the fund had not been appointed, and he was still in a position to appoint, and he did in fact appoint one-half of that half, or a quarter of the total fund, to his daughter Margery, and a quarter to his daughter Helen. At the same time he released in favour of those daughters his own life interest in the shares of the fund which were so appointed to them. For the moment I will disregard the surrender of his life interest, and I will treat the matter as though he had merely, on that date, appointed a quarter of the fund to each of those two ladies.

The first question that I have to determine is this: In those circumstances would those ladies have to bring the funds so appointed into account by reason of the provisions of cl. (iii) to which I have referred, upon the distribution of the estate of the intestate? I am not able to find in cl. (iii) any words which compel them to bring into account those funds appointed to them in the circumstances I have stated. The words are these: " Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives." I need not trouble with the words " on the marriage of a child of the intestate," because with regard to these two ladies they were at that time, and I think I am right in saying that they still are, spinsters.

Now can it be said that the shares of the settled fund appointed to them in the way that I have indicated, and on the supposition of their not becoming payable until the termination of the intestate's life interest under the settlement are caught by the words "money or property which, by way of advancement . . . . has been paid to such child by the intestate"? Those words do not appear to me to cover at all the case with which I am dealing. The transfers of these funds are not payments by the intestate: they are payments made by the trustees by virtue of the exercise of a power of appointment which must be read into the original settlement. They come to these ladies by reason of a settlement made before they were born, and before the marriage was solemnized of which they are the issue, and it seems to me to be quite impossible so to construe those words as to catch those funds.

I have been dealing with the matter for the moment on the supposition that there has been no surrender of the life interest, and I now turn to consider whether the circumstance that at the date when the father appointed to these two daughters he surrendered to them his life interest, makes any difference. I think it may well be argued that it makes a difference to this extent, that the life interest which he so surrendered is "money or property which by way of advancement . . . . has been paid to such child." The language is not apt, but I can conceive that the words might cover the life interest so surrendered. I think it is recognized that, if it be that only (namely, the surrendered life interest) upon which the clause operates, the result is nil, because that which is paid is to be brought into account at a valuation to be reckoned at the time of the death of the intestate, and it is quite obvious that at the death of the intestate the life interest surrendered by him five years before, which of course comes to an end on his death, if it is reckoned as at the death of the intestate, is of the value of nil, and accordingly nothing is to be brought into account.

I cannot see what other difference the surrender of the life interest could make. I do not see how the surrender of the life interest can turn something which comes to these ladies by reason of the provisions of a settlement made before the marriage of which they are the issue into something which could possibly be treated as being paid to them by the intestate. I think there was a good deal of force in Mr. Gover's argument that prima facie one would expect this clause to be dealing with property which would form part of the estate of the intestate, had it not been paid by way of advancement, had he retained it instead of advancing it; and it is quite clear that, if that be the side from which the clause is to be approached, the clause can have no possible relevance to a fund settled before the intestate's marriage, over which the intestate had no control, except so far as he could allocate the shares among the limited class of children. So far, I have dealt with the case of the two daughters.

The case of the son is more complicated. What happened in regard to the son was that the son was about to be married, and on May 19, 1919, the father appointed to the son one-half of the settled funds, and on the following day he, with the concurrence of his wife, requested the trustees to advance one-half of that one-half, that is to say, one-fourth of the whole fund, to the son immediately, which of course had the effect of the father releasing for the benefit of the son his life interest in one-quarter, namely, half of the half which he had on the previous day appointed to the son. On December 31, 1925, on the occasion on which the father made the appointment in favour of the two daughters, he, while surrendering his life interest in the fund appointed for that purpose, similarly surrendered his life interest in the one-quarter which had been appointed to the son in 1919, but in respect of which his life interest was at that time still existing.

For the reasons which I have given when I was dealing with the simpler case of the daughters, it appears to me that no part of this fund is in any way affected by cl. (iii) to which I have referred. I do not see any words there which can catch these funds at all, save in so far as conceivably the life interest which the father surrendered might be caught by the clause; but, as I have pointed out, if it is the life interest only which is caught, the result for the purpose of the operation of the section is nil.

As regards the capital of the fund appointed, the same considerations seem to me to apply in the case of the son as in the case of the daughters. This fund cannot in any way be said to be aptly described as a fund "paid to such child by the intestate." It is true that in this case there was the marriage of the son, and it was on the occasion of the marriage that there was an appointment to him, but all that that means is that on the occasion of the marriage he was given by his father's appointment a specific interest in funds in which before the appointment he had only an interest which was subject to be divested by the exercise of a power of appointment, and which was dependent, of course, if there was no appointment, on the number of children who ultimately qualified to take under the terms of the settlement. These funds were not funds which would, had these appointments not been made, have been part of the intestate's estate. In my view, accordingly, none of the funds with which I have dealt so far have to be brought into account under the terms of the clause.

There remains, therefore, only this other point, and I think as to this learned counsel appearing for the son agreed with the view, or was not prepared to argue against the view, that I am about to state. There is one fund which is caught. In the settlement which the son executed on the occasion of his marriage, there was contained a covenant by the father that he would make up the fund so settled to the sum of 10,000*l.* The father covenanted so to do within three months, and in fact carried out his covenant and in fact placed in the hands of the trustees of the marriage settlement of the son's marriage a sum which can now be valued at something in excess of 4000*l.* That sum does seem to me to be caught by the clause, because it was money or property which by way of advancement was paid to the child, and paid to the child none the less because by the arrangement made with him on his marriage it was paid to the trustees of his marriage

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settlement. It seems to me that that fund is caught. The other funds do not seem to me to be caught.

Solicitors: *C. R. Sawyer & Withall; Tarry, Sherlock & King.*

H. C. H.

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[1934. R. 1093.]

Company—Procedure—Russian Bank with London Branch—Dissolution of Bank by Russian Law—Action brought in Name of London Branch—Stay of Action—Plaintiff non-existent—Winding-up of London Branch as an unregistered Company—Action brought by Liquidator in Name of Company—Company not revived by liquidation—Stay of Action—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 190; *s.* 191, *sub-s.* 1; *s.* 338, *sub-ss.* 1 (*d*), 2; *s.* 342.

A bank incorporated in Russia in 1910 established a branch in London in 1915. The bank was dissolved by the laws of Russia in January, 1918. The London branch of the bank brought an action in 1921 to recover two sums of money alleged to be moneys of the plaintiff bank in the hands of the defendant bank. This action was stayed in 1932 by an order of the Court ([1932] 1 Ch. 435) on the ground that the plaintiff company no longer existed. A compulsory winding-up order of the company was subsequently made under s. 338 of the Companies Act, 1929, and it was afterwards held by Bennett J. ([1934] Ch. 276) that s. 338 did not operate to revive the plaintiff bank for the purposes of the action which had been stayed by order of the Court in 1932. The liquidator having obtained the leave of the Court brought an action under s. 191 in the name and on behalf of the company to recover the same two sums of money:—

Held, by the Court of Appeal (affirming Clauson J.), on a procedure summons taken out by the defendants, that the action was misconceived, as s. 191, sub-s. 1 (*a*), of the Companies Act, 1929, did not enable a liquidator to bring an action in the name and on behalf of a company which had no name and no existence; it only enabled a liquidator to enforce in the name and on behalf of a company any cause of action which the company suing in its own name could enforce.

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Russian and English Bank v. *Baring Brothers & Co.* [1932] 1 Ch. 435; *In re Russian and English Bank* [1932] 1 Ch. 663 and *Russian and English Bank* v. *Baring Brothers & Co.* [1934] Ch. 276 referred to.

PROCEDURE SUMMONS.

The Russian and English Bank was incorporated under the laws of Russia in 1910, and in 1915 a branch in London was established whereat an ordinary banking business was carried on. That branch complied with all the requirements of Part XI. of the Companies Act, 1929, relating to companies incorporated outside Great Britain and carrying on business within Great Britain. The bank was dissolved by virtue of a decree of the Soviet Government of Russia in January, 1918.

In 1921 an action was brought by the Russian and English Bank against Baring Brothers & Co., Ld., to recover two sums of 100,000*l.* and 80,000*l.*, alleged to be moneys of the plaintiff bank in the hands of the defendants, Baring Brothers & Co. The action lay dormant for a number of years. In January, 1932, on the application of the defendants, Eve J. made an order (1) staying all further proceedings in the action on the ground that the plaintiff company was no longer in existence.

In March, 1932, a petition was presented by creditors for the compulsory winding-up of the company (*In re Russian and English Bank* (2)), and a compulsory winding-up order was made by Bennett J., and a liquidator was subsequently appointed.

The plaintiff bank made an application to Bennett J. by motion for an order that the stay of all further proceedings in the action directed by the order of Eve J. dated January 12, 1932, be removed (*Russian and English Bank* v. *Baring Brothers & Co.* (3)). Bennett J. held that from the time that Eve J. made his order the action in which the motion was made was dead because there was no plaintiff to maintain it, and that s. 338 of the Companies Act, 1929, did not reanimate the plaintiff bank or avoid the dissolution brought about by the foreign law. The action was dead for all purposes.

(1) [1932] 1 Ch. 435.

(2) [1932] 1 Ch. 663.

(3) [1934] Ch. 276.

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On December 20, 1933, the Registrar in Companies Winding-up made an order authorizing the liquidator to bring the present action in the name and on behalf of the company.

The present action was commenced on June 6, 1934, by a writ in which the Russian and English Bank were the plaintiffs and Baring Brothers & Co., Ld., were the defendants. By the writ the plaintiff bank claimed a declaration that they were the assignees of two sums of 100,000*l.* and 80,000*l.* forming part of a certain account held by the defendant bank, and an order for the payment by the defendant bank of those sums.

The defendant bank took out a summons asking for an order that all further proceedings in the action might be stayed on the ground that the plaintiff bank was a dissolved corporation, and that the defendant bank's costs of the action and of the application might be taxed, and that the solicitors by whom the writ in the action was issued might be ordered to pay the costs to the defendant bank. That summons was addressed to the plaintiff bank and to the solicitors who issued the writ.

Gavin Simonds K.C. and *Andrewes-Uthwatt* for the defendant bank in support of the application.

Sir Albion Richardson K.C. and *Wynn Parry* for the plaintiff bank.

Clauson J. This is a procedure summons in an action which was commenced on June 6, 1934, by a writ in which the Russian and English Bank are the plaintiffs and Baring Brothers & Co., Ld., are the defendants. The writ asks for a declaration that the plaintiffs are assignees of certain sums, and an order for payment by the defendants of those sums and for consequential relief.

The summons before me is an application on the part of the defendants that all further proceedings in this action may be stayed on the ground that the plaintiff bank is a dissolved corporation, and that the defendants' costs in this action and this application may be taxed, and that the solicitors by whom the writ in this action is issued may be ordered to pay the costs to the defendants, and that summons is addressed to the plaintiffs and to the solicitors who issued the writ.

There was a precisely similar action before Eve J., which is reported under the name of the *Russian and English Bank* v. *Baring Brothers & Co.* (1) Eve J. was asked to stay that action on the ground that the plaintiffs were non-existent, and on that occasion Eve J. held that the plaintiffs were non-existent and made the order. It was suggested, as appears from the report of that case, that although the plaintiffs were non-existent because they had been dissolved in the country of their incorporation, it was possible that there might be power to wind up the English branch of that company as an unregistered company under s. 338 of the Companies Act, 1929. (2) That suggestion fell upon fruitful ground, and at a later date, as appears from a report entitled *In re Russian and English Bank* (3), Bennett J. made an order winding up the Russian and English Bank as an unregistered foreign company with a branch in England which had been dissolved. That step having been taken, and there coming therefore into existence a liquidator of this body, an application was made by the plaintiffs in the action to Bennett J.—which is reported under the name *Russian and English Bank* v. *Baring Brothers & Co.* (4)—for an order that the stay directed by Eve J. in 1932 of that action be removed. The position was considered by Bennett J. and he dismissed the motion, and in dismissing the motion he said this (5): " It is perfectly clear from the judgment of Eve J. that the ground upon which he made his order was that there were no plaintiffs before the Court. On March 8, 1932, under the provisions of s. 338 of the Companies Act, 1929, I made an order for the winding-up of the plaintiffs, and the foundation of the present application is a suggestion that the making of the winding-up order has revived the company and made the dissolution of the company void; and, the company having once more come into existence, it

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(1) [1932] 1 Ch. 435.

(2) See p. 137 post.

(3) [1932] 1 Ch. 663.

(4) [1934] Ch. 276.

(5) Ibid. 278.

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is suggested that it would be right in the exercise of the discretion of the Court to remove the stay directed by Eve J. and to allow the action to continue." His Lordship continued: "In my judgment, from the moment when Eve J. made his order in January, 1932, the action in which the present motion is made was dead—dead, because there was no plaintiff to maintain it; and I can see nothing in the language of s. 338 which reanimates the plaintiff or avoids the dissolution brought about by the foreign law. Therefore there is to-day no action in which the present application can be made. It is dead for all purposes. That is all that it is necessary for me to say to dispose of the present application." That I understand to be a decision by Bennett J. that the winding-up order did not reanimate the plaintiff bank or avoid the dissolution brought about by the foreign law. Sitting in a Court of equal jurisdiction I should, of course, be bound to follow that view expressed by Bennett J., and I follow it with no reluctance, as it commends itself entirely to my own judgment.

What has happened since is this. The Russian and English Bank, the plaintiff bank, which has not been reanimated and the dissolution of which, brought about by the foreign law, has not been avoided, has again professed to issue a writ, the writ in the action now before me, and is repeating, as I understand, the claim made in the old action. The defendants are applying that the action may be stayed on the ground that the plaintiff bank is a dissolved corporation; in other words, that the position as regards the alleged existing plaintiff is precisely the same as it was when Eve J. gave his decision prior to the liquidation, and as it remained after the liquidation as Bennett J. decided. For myself I can see no answer at all to the application. That has this odd result. A winding-up order has been made, and as Sir Albion Richardson, who professes to appear for a plaintiff that I feel bound to regard as non-existent, points out it is the duty of the liquidator, who has come into being by virtue of the winding-up order and the usual subsequent proceedings, to collect the assets of this non-existent corporation. As to that there is no doubt that that is his duty, and he must collect them by such means as are at his disposal. All I am called upon to decide is whether one of the means at his disposal is to commence an action in the name of a non-existent plaintiff. In my view I am bound by the decisions to which I have already referred to hold that the non-existent plaintiff can no more sue now than it could before the winding-up order. It has not been reanimated and the dissolution is not avoided. I am by no means satisfied that there is not sufficient provision made by the Act to meet the difficulty. I do not profess to say much about it, because all I have to deal with is the present position, in which I have before me an action by a non-existent plaintiff. No doubt in due course it will be considered whether or not, by utilizing the machinery provided by s. 190 of the Companies Act, 1929 (1), which reproduces s. 203 of the Companies Act, 1862, it will not be possible for the liquidator to obtain an order vesting in him whatever property belonged to the dissolved company before it was dissolved, and enabling him accordingly by virtue of that vesting order in his own name to recover that property. I offered Sir Albion Richardson an opportunity of considering whether that step could be taken, but, as he very frankly admitted, the effect of taking that step, if it can be taken, would mean that he would have to join as plaintiff the liquidator who has come into being by virtue of the winding-up order, and who would accordingly make himself personally responsible for costs should it turn out that the action failed. Sir Albion Richardson, however, did not see his way to advise his clients to procure the liquidator to put himself into a position of such jeopardy. It was suggested that the machinery which I have spoken of, s. 190, might not be applicable, but Mr. Gavin Simonds, for the defendants, said that so far as his clients were concerned, if a vesting order were made under that section and the liquidator were joined as plaintiff so that he became personally liable for costs, the defendants would not take any objection, if such an objection could be taken, that the vesting order was not justified by s. 190. The practical question seems to be whether or not the defendants are to have the liquidator's personal liability for costs. I do not propose to intimate a final opinion on the question whether or not s. 190 is applicable for the purpose suggested. That may have to be determined on some other occasion. It is sufficient for me to say that sitting in this Court, with the decisions to which I have referred before me, it seems to me to be impossible for me to hold that this non-existent plaintiff can, as matters stand, sue.

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(1) See p. 137 post.

Sir Albion Richardson put forward a very ingenious argument, which it is necessary for me to deal with. He pointed out, very correctly, that the effect of a winding-up order was to impose a duty upon a liquidator of a company to get in the assets of the company, and he suggested that on the true construction of s. 191 of the Companies Act, 1929, the Legislature had given to the liquidator the power of bringing a legal proceeding in the name and on behalf of the company in order to recover assets belonging to the company. I do not so read that section. I understand that section to mean this, that it is the duty of the liquidator to enforce in the name of the company and on behalf of the company any right of action which the company suing in its own name could enforce. But it does not appear to me that that section creates in the liquidator a new cause of action in the name of the company which the company itself could not enforce by action. I do not understand how a liquidator can sue on behalf of a non-existent company. The real strength of Sir Albion Richardson's argument was that unless the section means what he contends it means the company for whom he professes to appear, and the liquidator of the company, will not be able to recover the assets. The answer to that may well be, and I suggest very likely is, that s. 190 provides the proper machinery for recovering the assets of the company, but I am not concerned to decide whether there is any such machinery. It may be that Sir Albion Richardson will be able to satisfy some Court that s. 190 does not help him, but that will not make this action any better. This action remains, so far as I am concerned, and I am bound by the earlier decisions with regard to this point, an action by a non-existent plaintiff.

I ought to mention that an order made by the Registrar in Companies Winding-up, which is a domestic matter as between the liquidator and those concerned in the assets, has authorized the liquidator to bring this action in the name of the company. I need scarcely say that that order cannot possibly affect the rights of the defendants. It certainly cannot, if I may again quote the language of Bennett J.: "reanimate the plaintiff or avoid the dissolution brought about by the foreign law."

Under those circumstances I see no alternative but to make an order staying all proceedings in this action, order the taxation of the defendants' costs, and order that the solicitors, the respondents to this summons, should pay them. I need scarcely say that, in a matter of such importance as this, there will, if desired, be leave to appeal.

The plaintiff bank appealed. The appeal was heard on November 20, 1934. C. A.

Sir Albion Richardson K.C. and *Wynn Parry* for the appellants. The decision of Clauson J. staying all further proceedings in the action on the ground that the plaintiffs were non-existent was wrong. On the true construction of the Companies Act, 1929, the plaintiffs were given a notional existence for the purpose of the winding-up, and the liquidator had power to bring an action in the name and on behalf of the company. Sect. 338, sub-s. 2, exactly fits the present case. Under that section a company incorporated abroad which has ceased to carry on business in this country may be wound up as an unregistered company notwithstanding that it has been dissolved or otherwise ceased to exist as a company under the laws of the country under which it was incorporated. That section was enacted for the purpose of enabling English creditors of a foreign company with an English branch to collect, through the machinery of winding-up the company, debts due to them from the company in this country. Under s. 338, sub-s. 1, all the provisions of the Act with respect to winding-up are made to apply to an unregistered company. There is a proviso to s. 342 that an unregistered company should not, except in the event of its being wound up, be deemed to be a

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company under the Act. That must mean that an unregistered company when being wound up is to be deemed to be a company. Sect. 338, sub-s. 1 (*d*), gave as one of the circumstances in which an unregistered company might be wound up the fact that the company was dissolved or had ceased to carry on business, and therefore an unregistered company could be wound up although it had ceased to exist in the country where it was incorporated. If an unregistered company, which was being wound up because it had been dissolved or had ceased to carry on business, was not reanimated by the winding-up order there was nothing upon which the winding-up order could operate. If the company remained non-existent ss. 190 and 191 could have no operation and the liquidator could not collect the assets of the company. Under s. 203, sub-s. 1, as soon as a winding-up is made the Court shall cause the assets of the company to be collected. Sect. 191, sub-s. 1, expressly gave power to a liquidator in a winding-up by the Court to bring or defend any action or other legal proceeding in the name and on behalf of the company. The result was that while the company was in fact non-existent the Legislature had clothed it with a notional existence for the purpose of enabling the liquidator to collect the assets of the company. Sect. 190 could not apply to the present case if the plaintiff company was non-existent, because that section provided for an order vesting the property of a company being wound up in the liquidator, and a non-existent company could not own property. Unless the company and its liquidator were allowed to bring this action the assets of the company could not be collected. [*Ex parte Ball* (1) and *In re Muggeridge* (2) were cited.]

Gavin Simonds K.C. and *Andrewes-Uthwatt* for the respondents. The defendants were sued by the Russian and English Bank, which was not a natural person but an artificial person. Could such a person sue? Scrutton L.J. in *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (3) said: " So in the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognized in other countries by international comity, though its incorporation is not in accordance with their law. If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person. I cannot conceive a company, whose existence and attributes arise solely from the law of Russia, continuing to exist when the law of Russia says it is dissolved. . . . In my opinion therefore English Courts are bound to treat this plaintiff bank as dissolved and incapable of suit in English Courts." Atkin L.J. in the same case also said (1): "In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our Court must also treat the corporation as dissolved." Applying that test to the present case it could not be said that the plaintiff company was in existence. There was no provision in the Act of 1929 which revivified the plaintiff company so as to enable it to sue. Sect. 190 was designed to meet the case of an unregistered company being wound up and to enable the liquidator to collect the assets of the company by bringing actions in his own name.

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(1) (1874) L. R. 10 Ch. 48.
(2) (1870) L. R. 10 Eq. 443.
(3) [1923] 2 K. B. 682, 691.

[They were stopped.]

Sir Albion Richardson K.C. replied.

Slesser L.J. This appeal raises a question of some difficulty with regard to the rights of the liquidator of an unregistered company under the Companies Act, 1929, to bring actions, to get in assets, and to protect the property of the company in liquidation. We have, however, come to a clear conclusion on the matter and do not think it necessary to reserve our judgment for further consideration.

The action was originally started by a foreign company called the Russian and English Bank. It was, according to the statement of claim in this case, incorporated under Russian law as long ago as 1910. In 1915 a branch of that

(1) [1923] 2 K. B. 693.

bank, called the London branch, was established in London. That branch complied with all the requirements of Part XI. of the Companies Act, 1929, gave the necessary particulars to the Registrar under s. 343, and the sections following, and was in every way properly to be recognized under the Companies Acts as an English branch of a foreign company.

In 1921 an action was brought by the Russian and English Bank for a declaration that they were assignees of a considerable sum of money, some 180,000*l.*, forming part of an account which was held by the present defendants, Baring Brothers, Ld., and for an order for payment to them. Nothing, however, was done in that action for a considerable number of years, and it was not until the year 1929 that any action was taken. From 1921 to 1929 the action was suspended. Questions had been raised in the Courts meanwhile as to the continued legal existence of certain Russian companies and banks, of which this was an example, by reason of the legislation and administration of the Russian Government, and although at one time it was held in the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1) that that legislation had not necessarily brought these Russian banks to an end, yet by the time the case of *Lazard Brothers & Co.* v. *Midland Bank, Ld.* (2), had reached this Court in the year 1931 the view was taken that the action of the Russian Government had been such that the particular bank then under consideration, the Moscow Industrial Bank, had ceased to have any legal entity, and that view was confirmed by the House of Lords. (3)

As regards the particular bank now under consideration, the Russian and English Bank, their action against the defendants, which had been dormant since 1921, was revived and prosecuted in 1929. A motion to stay all proceedings in the action came before Eve J., who held (4) that the Russian and English Bank was dead, and could not bring an action at all, and he accordingly stayed the proceedings for that reason. He applied the dictum of Scrutton L.J. in the *Banque*

(1) [1925] A. C. 112.
(2) [1932] 1 K. B. 617.
(3) [1933] A. C. 289.
(4) [1932] 1 Ch. 435.

Internationale de Commerce de Petrograd v. *Goukassow* (1), that "If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person," and he came to the conclusion that this bank, both in Russia and in England, had ceased to exist as a legal person. Since that time, in the various litigations which have followed, it has never been disputed that the Russian and English Bank, as such, has ceased legally to exist. The next stage in the proceedings was this: It was decided to wind up the English branch of this company, and that was done under the machinery of the Companies Acts. The Companies Act, 1929, in addition to applying to companies registered under that Act, has a particular part, Part X., dealing with the winding-up of unregistered companies. This particular company fell within the definition of an unregistered company under Part X., and by s. 338, sub-s. 1 (*d*), one of the circumstances in which an unregistered company may be wound up is if the company is dissolved. Acting under that power Bennett J. ordered (*In re Russian and English Bank* (2)) that this company should be wound up and a liquidator was duly appointed.

In the history of this case we have next to notice an action before Bennett J. (*Russian and English Bank* v. *Baring Brothers & Co.* (3)). A compulsory winding-up order having been made, there was a motion before Bennett J. that the stay of all further proceedings which had been ordered by Eve J. in 1932 (4) should be removed, and that the action should be allowed to proceed. Bennett J., however, declined to accede to that application, for the reason, to quote his own words (5): "In my judgment, from the moment when Eve J. made his order in January, 1932, the action in which the present motion is made was dead—dead, because there was no plaintiff to maintain it; and I can see nothing in the language of s. 338 which reanimates the plaintiff or avoids the dissolution brought about by the foreign law. Therefore

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(1) [1923] 2 K. B. 682, 691.
(2) [1932] 1 Ch. 663.
(3) [1934] Ch. 276.
(4) [1932] 1 Ch. 435.
(5) [1934] Ch. 278.

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there is to-day no action in which the present application can be made. It is dead for all purposes."

Now we come to the final stage in this matter, the present litigation. The liquidator having been appointed, and having obtained ex parte leave to bring the present action in the name of the company, the matter came before Clauson J. on a procedure summons, taken out by the defendants, that all further proceedings in the action be stayed on the ground that the plaintiff bank is a dissolved corporation. There is no question that the plaintiff bank is a dissolved corporation, but Sir Albion Richardson, as I understand him, argues in this way in order to preserve the rights of the liquidator to bring this action: He says, quite correctly, as it appears to me, that under s. 338, and indeed under the whole of Part X. of the Companies Act, 1929, it is contemplated that a company which is dissolved may, nevertheless, be wound up as an unregistered company, and he particularly draws attention to s. 342, which in effect says that an unregistered company shall, for the purpose of its being wound up, be deemed to be a company under the Act. That being so, he says that the liquidator duly appointed under the Act has all the powers which are conferred upon a liquidator under the Act, because, for the purpose of his bringing actions in the name of, and on behalf of, the company, the company, in so far as it is an entity capable of being wound up, is reanimated, and so has a name, and actions can be brought on its behalf. The argument, so far, of Sir Albion Richardson seems to me unassailable, that by reason of those provisions an unregistered company which has been dissolved may, under the provisions of s. 338, sub-s. 1, or possibly of s. 338, sub-s. 2, be wound up as an unregistered company; but where I part company from him is when, having got to that point, he argues that he falls within the provisions of s. 191, sub-s. 1 (*a*): "The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection—(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company." Although a liquidator may be vested generally with the powers in a winding-up in the manner that I have indicated, the particular power to bring actions is limited, in my view, in s. 191 to the power there stated, that is to bring an "action or other legal proceeding in the name and on behalf of the company." I cannot think that those words are as wide as Sir Albion Richardson would wish us to say. I do not think that they extend to bringing an action in the name and on behalf of the company merely because the company, having been dissolved, may be wound up, when in reality the company has no existence. It has, in such a case, no name, and there is no company on behalf of which the action can be brought. I instance as an example of the manner in which this section must be interpreted that there are other associations which have no common name, such, for example, as an unregistered friendly society, or co-operative society, or indeed any association which is carrying on trade of any kind, because the definition of an unregistered company includes any association or company save the special exceptions mentioned in s. 337, and in the case of those which never had a common name they could not bring an action in the name of the unregistered society or club; they would have to proceed through trustees or through a committee, or, in appropriate cases, by a representative action. It seems to me difficult to think, where such an association could not bring an action in its own name, that after it was wound up this section, unless there were express words in that behalf, would enable the liquidator to bring an action in a name which the association could not have used before it was wound up. I instance that as an example of the fact that one has to approach s. 191 and construe it carefully in relation to the exact situation of the body which is being wound up, and not give it that wide and unrestricted construction for which Sir Albion Richardson contends—namely, if once it is a company within Part X. it thereby acquires, even though it had not one before, a name in which an action can be brought by the liquidator.

That view is fortified by the provisions of s. 190. Sect. 190, as Mr. Gavin Simonds has pointed out, is, with modifications, derived from s. 272 of the Act of 1908. In that earlier section, and also substantially in s. 203 of the Act of 1862, it is in terms provided that " If an unregistered company has no power to sue and be sued in a common name "—which applies to the class of association that I have just been mentioning— " or if for any reason it appears expedient, the Court may by the winding-up order, or by any subsequent order, direct that all or any part of the property, real and personal (including things in action), belonging to the company, or to trustees on its behalf, is to vest in the liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly ; and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property." In such a case it is clear that an unregistered company which never had any common name could, nevertheless, be wound up, and actions could be brought, by reason of those sections, in cases where the proper indemnity had been given by the liquidator in his official name. So here, Mr. Gavin Simonds, as I understand him, is constrained to agree that there is nothing in s. 190—which includes all the powers in the sections that I have mentioned in the 1908 and 1862 Acts, and is even rather wider in its terms—in an appropriate case where the liquidator has obtained the necessary authority and has given the necessary security, to prevent him from bringing an action in his official name to get in the assets of an unregistered company. I mention that, not that in the present case it is required to act under s. 190, nor are we called upon to express any concluded view about it, because, as Roche L.J. pointed out during the argument, the mere assent to that course by the defendants here would not give the Court jurisdiction, if jurisdiction were otherwise lacking ; but it does, I think, deal substantially with the point which was raised by Sir Albion Richardson that if he is wrong in saying that s. 191 does not avail him, the people interested in this company would be without a remedy to protect their assets. The answer is that it appears that in such a case s. 190 would directly enable such a body as this, as it would enable an association which never had a common name ab initio, to protect its assets, and the difficulty that the liquidator could not inherit a name would be overcome by the fact that he is expressly entitled to sue in his official name under s. 190. As I say, that method of procedure has not been attempted in the present case, and if it is attempted I do not wish to say anything in the present case which will prejudge the success or failure of that attempt. It would appear, so far as it is necessary for the decision in this case, that, at any rate, there is strong reason to believe that s. 190 will cover any cases of difficulty such as the present, or such as the case of an association without a common name which otherwise would be lacking any machinery to protect its assets. I would add, and I am fortified by this, that we are told that so experienced a judge as Clauson J., who tried this case below, expressed his view that s. 190 would cover probably such a case as this.

It follows, therefore, that this action is wrongly conceived, and that s. 191, sub-s. 1 (*a*), cannot here apply, because this company has no name and no entity for the liquidator to act on its behalf. Therefore this appeal fails. It also follows, having regard to the decision in *Simmons* v. *Liberal Opinion Ld.* (1), and similar cases, that the solicitors who launched this case in the name of a non-existing client must suffer the effects of that order which Clauson J. has made in this case, and which we cannot disturb. The appeal therefore fails.

ROCHE L.J. In spite of the very strenuous and able argument of Sir Albion Richardson and Mr. Wynn Parry I have no doubt whatever that the decision of Clauson J. staying this action was right, and that this appeal should be dismissed. On the main question I have nothing to add to the reasons assigned by Clauson J. and my Lord. I desire only to make one or two observations with regard to s. 190 of the Companies Act, 1929, which arose incidentally for

(1) [1911] 1 K. B. 966.

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consideration in this case. I am of opinion that if the liquidator desires to proceed at all he must proceed under s. 190. In this case his course would seem to be fairly clear with regard to procedure under that section for this reason, that I understand Sir Albion Richardson and Mr. Wynn Parry, whilst strenuously contending that they need not proceed under that section, but are entitled to proceed in the name of the company under s. 191, yet maintain the position that they can proceed under s. 190 if the liquidator wishes to do so, and the Court will make an order vesting the property of the company in the liquidator by his official name. Equally on the other side Mr. Gavin Simonds stated before Clauson J. that he would not oppose an application made under s. 190, and he has made his position rather clearer before this Court. Recognizing, of course, as my Lord has said, that mere consent of the parties cannot give a Court jurisdiction when it does not possess it, Mr. Gavin Simonds stated that what he intended to convey to Clauson J., and certainly did convey to this Court, was that not only was he not opposing such an action, but that he was arguing and contending that the section properly applied, and that the Court had jurisdiction. Speaking for myself, I entertain the view that s. 190 does apply to this case, but of course, inasmuch as this matter does not arise for our decision in this appeal, that expression of opinion is not binding upon this or any other Court in a case where the matter may arise for argument and decision.

In the result, for the reasons I have already stated, I agree that this appeal should be dismissed, with the consequences as to costs which have been indicated by my Lord.

Appeal dismissed.
Leave to appeal refused.

Solicitors for appellants: *F. M. Guedalla & Co.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff & Thompson.*

R. F. S.

NOTE.

COMPANIES ACT, 1929.

PART V.

Sect. 190: " Where a company is being wound up by the court, the court may on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property."

Sect. 191, sub-s. 1: " The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection—

(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company: . . . ."

Sect. 203, sub-s. 1: " As soon as may be after making a winding-up order, the court shall . . . . cause the assets of the company to be collected. . . . ."

PART X.

Winding-up of unregistered Companies.

Sect. 337: " For the purposes of this Part of this Act, the expression ' unregistered company ' shall include any trustee savings bank certified under the Trustee Savings Bank Act, 1863, and any partnership, whether limited or not, any association and any company with the following exceptions:—

(1.) a railway company incorporated by Act of Parliament . . . .;

(2.) a company registered in any part of the United Kingdom under the Joint Stock Companies Acts or under the Companies Act, 1862, or under the Companies (Consolidation) Act, 1908, or under this Act;

(3.) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company;

(4.) . . . ."

Sect. 338, sub-s. 1: " Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

. . . .

(*d*) The circumstances in which an unregistered company may be wound up are as follows:—

(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.

. . . ."

Sub-s. 2: "Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

Sect. 342: "The provisions of this Part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act:

"Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part of this Act."

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Nov. 20.

In re WILLIAM ADLER AND COMPANY, LIMITED.

[No. 00723 of 1932.]

Company—Winding-up—Costs—Taxation—Resolution for Voluntary Liquidation—Subsequent Compulsory Order—Usual Order for Taxation between Party and Party—Voluntary Liquidator's Costs of period between Resolution and Order—Costs of opposition to Compulsory Order allowed between Solicitor and Client—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 175, 254—*Companies (Winding-up) Rules,* 1929 (*St. R. & O.* 1929, *No.* 612/*L.* 16), *r.* 192, *sub-r.* 1.

A company passed a resolution for voluntary winding-up. Five days later a petition was presented by a creditor for a compulsory order, and a month later the usual compulsory order with the usual order as to costs was made. The voluntary liquidator appeared on the petition in opposition to it. On the taxation of costs the registrar disallowed certain items of costs incurred by the liquidator after the resolution but before the petition was heard, including the costs of consultations by the liquidator and of obtaining counsel's opinion. The solicitor to the liquidator then brought in a further bill of costs, including items disallowed on the previous taxation, but allowable on a taxation between solicitor and client:—

Held (affirming the decision of Eve J.), that these costs, which were costs incurred by the liquidator in opposing a compulsory order, were properly allowed, in the discretion of the Court.

Summons to review taxation.

William Adler & Co., Ld., was incorporated on May 3, 1920, with a capital of 10,000*l.*, of which 9400*l.* was paid up, to acquire a tailor's and outfitter's business at Newcastle-on-Tyne.

On October 20, 1932, at an extraordinary meeting of the company, a resolution to wind it up was passed, and Mr. Harris Rainsbury was appointed liquidator. On October 25 a petition was presented by a judgment creditor for the compulsory winding-up of the company, and the liquidator instructed his solicitors to oppose it, and considerable costs were so incurred. On November 23, 1932, a compulsory order was made for the winding-up of the company with the usual order as to costs, and the Official Receiver was appointed liquidator. A bill of costs for 290*l.* was then carried in by the voluntary liquidator and taxed at 163*l.* by the registrar. Among the items disallowed were items of costs incurred by the liquidator after the resolution but before the petition was heard, including the costs of consultations by the liquidator and of obtaining counsel's opinion. Before this bill was taxed the voluntary liquidator had taken out a summons to have his remuneration fixed. A second bill of costs was then brought in by the voluntary liquidator, including therein items which had been disallowed on the previous taxation, but which the liquidator claimed to be allowed on a solicitor and client basis. The Official Receiver objected to these items, and to the bill generally; but Mr. Registrar Stiebel overruled the objections, and taxed the bill as between solicitor and client. At the date of the winding-up the company was insolvent. (1)

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(1) Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 175, sub-s. 1: "Where before the presentation of a petition for the winding-up of a company by the court a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding-up shall be deemed to have been validly taken."

Sect. 254: "All costs, charges, and expenses properly incurred in the winding-up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

Companies (Winding-up) Rules,

W. E. Behrens (*G. O. Slade* with him) for the Official Receiver and liquidator. There are two general objections to this bill of costs which Mr. Registrar Stiebel has disallowed: (1.) the costs of a voluntary liquidator should be taxed as between party and party and not as between solicitor and client, and (2.) only one bill of costs in relation to the opposition to the petition ought to be allowed. It is submitted that the whole of the present bill should be disallowed. The costs have already been taxed and paid as between party and party. A solicitor cannot bring in another bill of costs for the purpose of getting costs which have been disallowed on a previous taxation.

A voluntary liquidator has no right whatever to oppose a winding-up petition in Court at the cost of the company. Again the company and the liquidator cannot be separately represented: if they are they will only be allowed one set of costs: *In re Hall (A. W.) & Co., Ld.* (1); *In re Mont de Piété of England* (2); *In re C. B. & M. (Tailors), Ld.* (3)

In the latter case, where the company's solicitors were allowed costs as between solicitor and client, the company was perfectly solvent, but here the company is insolvent. After the commencement of the voluntary winding-up the company was not in a position to incur any costs. The liquidator is entitled to prove for his costs, but not to preferential payment of costs as between solicitor and client.

J. B. Lindon for the voluntary liquidator. It is true that only one set of costs can be allowed, but that does not exclude the solicitor's right to costs as between solicitor and client. The Companies Act, 1929, s. 175, has made a material difference to the situation. The effect of the presentation of the petition is to date back the commencement of a winding-up

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1929, r. 192, sub-r. 3: "Nothing contained in this Rule shall apply to or affect costs which, in the course of legal proceedings by or against a company which is being wound up by the Court, are ordered by the Court in which such proceedings are pending or a Judge thereof to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable."

(1) (1885) 34 W. R. 56.

(2) [1892] W. N. 166; 37 Sol. Jo. 48.

(3) [1932] 1 Ch. 17.

to the date of the resolution for voluntary winding-up, and all proper costs incurred since then ought to be allowed.

Sect. 254 of the Act shows what would have happened if the compulsory order had not been made. The liquidator is not personally liable for these costs and they ought to be allowed: *In re Trueman's Estate.* (1) See r. 192 of the Companies (Winding-up) Rules, 1929, the proviso to which contained in sub-r. 3 was first inserted after the Act of 1929. These are costs which in the order of priority come before the remuneration of the voluntary liquidator. Where there has been a declaration of solvency a voluntary liquidator is entitled to oppose a petition for a compulsory order. The order made by Bennett J. does not affect the costs previously ordered to be paid.

W. E. Behrens in reply. The Official Receiver submits that it is no part of the duty of any voluntary liquidator to oppose a winding-up petition. If he appears to assist the Court there will be no party and party items, and if he fights for his own hand the costs are not properly incurred as costs in a winding-up. The order that the costs be taxed on a party and party basis cannot enable him to recover solicitor and client costs.

Eve J. This is an application to review the taxation of the bill brought in under an order made by Bennett J., when he ordered the company to be wound up compulsorily on a petition presented on October 25, 1932. The order for taxation was in the usual form, and directed that the costs of the company should be taxed as between party and party. In the bill brought in the solicitor acting for the liquidator charged, as against the assets, certain items which were not properly included or could not be taxed under the order of Bennett J., but were costs which the solicitor was undoubtedly entitled to be paid.

In cases of this class costs may be regarded as falling under three heads. First there are costs which the company has incurred prior to the passing of any resolution or the filing

(1) (1872) L. R. 14 Eq. 278.

of any petition for winding-up. The individual claiming those costs is in the same position as any other creditor of the company; he has given the company the benefit of his advice, the company has not paid for it, and he must take steps in the winding-up to recover in respect of those costs such dividend as is payable out of the assets. The next costs to which I refer are the costs of appearing on the petition, and the ordinary rule is to give the liquidator the costs of appearing on making the order, and if there is nothing more than that, the bill which the liquidator brings in is a bill which starts with the first step taken towards the winding-up, as a rule the presentation of the petition, and as from the date of that he is entitled to be paid out of the assets, as between party and party, such costs as have been properly incurred. If between the date of the passing of a resolution for voluntary liquidation and the filing of a petition subsequently presented for compulsory winding-up costs have been incurred by the solicitor representing the company and its liquidator, according to well settled practice the solicitor is entitled to have those costs, so far as they are proper, taxed and paid, because by s. 175 of the Companies Act, 1929, the Court is bound to treat the commencement of the winding-up as the date when the voluntary resolution was passed; and a solicitor carrying in a bill in those circumstances is in the same position as is one who carries in a bill when there has been no voluntary winding-up, but the presentation of the petition is the commencement of the winding-up.

In this case, as in most cases, the bill delivered was a continuous bill commencing with the employment of the solicitor in the anticipated voluntary winding-up, and including all the items which the solicitor was claiming to be due to him from the company in liquidation. Some of those items would, of course, fall to be allowed under the party and party order. But that does not mean that when the solicitor delivers his bill, to be taxed under the party and party order, every item must be eliminated which could not be included in the party and party taxation to which he is entitled under the general practice. Here exception

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is taken to the learned registrar having dealt with the whole bill item by item and having treated those items which might not have been payable under the party and party taxation as subject to taxation and certifying what was due to the solicitor. Exception is taken on the ground that these costs between the voluntary resolution and the presentation of the petition ought not to be allowed in this bill. That would only mean that a supplemental bill would be brought in; but under the rules it is not usual to adopt that procedure. In my opinion the position of the liquidator entitles him to deliver the bill and to ask for it to be taxed, although it includes items not allowable under the party and party taxation. He is in the position of being able to say, according to the authorities, that all costs properly incurred between the date of the resolution and the order made on the petition are subject to taxation, and when taxed are entitled to priority over the other claims against the company's assets. All that the learned registrar has done here is to include a few items which could not be included in the party and party costs, but which were properly incurred and were conveniently included and dealt with on this taxation.

I think that the summons is misconceived, and must be dismissed with costs.

H. L. L.

C. A.

The Official Receiver and liquidator appealed. The appeal was heard on November 20, 1934.

G. O. Slade for the appellant. The question in this appeal is whether a voluntary liquidator is entitled to tax upon a solicitor and client basis a bill of costs against the assets of the company in compulsory liquidation in respect of items relating to his opposition to the making of the compulsory order, when the Court has already made an order in his favour for his costs of that opposition and those costs have been taxed and paid. The matter is res judicata, inasmuch as there has been a taxation pursuant to the judge's order that the company's costs should be taxed. When the bill for the company's costs

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has been taxed a further bill cannot be brought in. It is no part of the duty of a voluntary liquidator to oppose a petition for the compulsory winding-up of the company. His duty is merely to place the facts before the Court. The opposition of a voluntary liquidator to the making of a compulsory winding-up order cannot be said to be done in preserving the assets of the company, and therefore the costs of such opposition cannot come within the words in r. 192 of the Companies (Winding-up) Rules, 1929: "the fees and expenses properly incurred in preserving realising or getting in the assets" which under that rule are the first charge on the assets. Fees and expenses properly incurred in preserving the assets must be expenses incurred otherwise than in opposing a petition for a compulsory winding-up order, because otherwise the solicitor of a voluntary liquidator who opposed the making of a compulsory winding-up order would get the taxed costs of the petition which are taxed on a party and party basis and under the rule stand first in priority, and he would then get the items that had been disallowed in that taxation taxed as between solicitor and client in priority to his party and party costs, inasmuch as they would be considered to have been properly incurred in preserving the assets of the company, which would be a very absurd result. In *In re C. B. & M. (Tailors), Ld.* (1), it was held by Eve J. that the solicitor of a company, who had on the instructions of the company and its directors opposed a petition for a compulsory winding-up order, the costs of the company having been taxed as between party and party and paid out of the assets, was entitled to prove in the liquidation for the balance of his bill of costs taxed as between solicitor and client. That decision supports the contention of the Official Receiver in the present case. In that case there was no voluntary liquidation, and the company were entitled to instruct solicitors to oppose a petition for a compulsory winding-up order and to incur liability for solicitor and client costs over and above party and party costs. Whereas in the present case the company could incur no liability because the liquidation had commenced. Further, that company was

(1) [1932] 1 Ch. 17.

solvent and therefore the liability had to be met in full, whereas in the present case the company is insolvent and this liability could only be proved for, unless it has been incurred for the preserving of the assets.

J. B. Lindon for the voluntary liquidator was not called on.

Slesser L.J. This is an appeal from a judgment of Eve J. whereby he has decided that the liquidator of this company, William Adler & Co., Ld., who employed a solicitor whilst he was acting as liquidator in the voluntary winding-up before the date when a compulsory winding-up order was made, is entitled to costs as between solicitor and client—costs, some of which were incurred in matters preliminary to and before the compulsory winding-up of this company and others in relation to the actual opposition to that order. In my opinion the question whether these costs, to which objection is taken, amounting in all to a sum of about 18*l.*, should or should not be allowed as between solicitor and client is a matter for the discretion of the judge who has heard the application in a review of taxation. By r. 192, sub-r. 1, of the Companies (Winding-up) Rules, 1929: "The assets of a company in a winding-up by the Court, remaining after payment of the fees and expenses properly incurred in preserving realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs, and expenses as the Court may allow to a liquidator appointed in such voluntary winding-up shall, subject to any order of the Court, ... be liable to the following payments, which shall be made in the following order of priority, namely :—*First.*—The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court. . . . ."

In my opinion it may properly be found by the judge in an appropriate case that the costs of consultations of the liquidator during the voluntary winding-up of the company and relating to the opposition to a petition for a compulsory winding-up order before the compulsory order has been made, and of what is done by way of attendances on counsel and in obtaining counsel's opinion, may properly be said to be payments of fees and expenses properly incurred in preserving the assets within the meaning of the earlier words in r. 192, sub-r. 1, which by the terms of the rule may include such costs and expenses as the Court may allow to the liquidator appointed in the voluntary winding-up.

Also it may well be considered expedient that a company which is being wound up voluntarily should desire to preserve that status, and if it can be said that the opposition of a liquidator during a voluntary winding-up to the making of a compulsory order is made to preserve the assets of the company, then the costs of such opposition may properly be allowed as coming within the same words of the rule. It is for the Court to say whether such costs shall be allowed and, if so, whether they shall be allowed on a solicitor and client basis or on a party and party basis; it is a matter for the exercise of the discretion of the Court. That being so, I have come to the conclusion that we cannot disturb the judgment of Eve J., who in giving judgment said: "In my opinion the position of the liquidator entitles him to deliver the bill and to ask for it to be taxed, although it includes items not allowable under the party and party taxation. He is in the position of being able to say, according to the authorities, that all costs properly incurred between the date of the resolution and the order made on the petition are subject to taxation, and when taxed are entitled to priority over the other claims against the company's assets."

For these reasons the appeal fails.

Roche L.J. I agree. This is an appeal from the refusal of Eve J. to accede to an application to review taxation. The total sum at issue is about 18*l.*; but it is said that a question of principle is involved which depends upon the correct construction of r. 192, sub-r. 1, of the Companies (Winding-up) Rules, 1929.

To summarize the argument of Mr. Slade for the appellants, as I apprehend it; what he says is that the liquidator could under an order allowing him costs as between party and party come under the heading labelled "First" in the rule—"First.—The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court" and has in part obtained and acted on such an order, and is therefore precluded from obtaining those costs under the earlier words of the rule, "payment of the fees and expenses properly incurred in preserving realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs, and expenses as the Court may allow to a liquidator appointed in such voluntary winding-up." In my opinion that argument is unsound and no such principle can be deduced. On the contrary, it may very well be that costs might be disallowed in taxation under the "First" heading which in a proper case might be allowed on the footing that they were payments incurred by a liquidator in preserving the assets of the company. Whether this taxation has proceeded rightly is therefore a question which does not involve any principle, but is one involving first a finding of fact and then the exercise of discretion by the Court. Mr. Registrar Stiebel has found, and his finding has been affirmed by the learned judge, that these costs were payments properly incurred in preserving the assets, and they have been allowed on a solicitor and client basis. With that finding of fact and subsequent exercise of discretion this Court has no right to interfere. Accordingly this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Stafford Clark & Co.*
Solicitor for respondent: *Lucien Fior.*

R. F. S.

LUXMOORE J.

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May 15;
Nov. 2;
Dec. 4.

1934
Jan. 11;
June 8;
July 9, 11,
12, 13, 25.

In re THE COLONIAL BISHOPRICS FUND, 1841,

AND

In re THE CHARITABLE TRUSTS ACTS, 1853 TO 1925.

[1933. C. 1804.]

South Africa—Resolutions of English Clergy and Laity—Fund established to found Bishopric in Cape Town—Church to be in connection with Church of England—Independent Legislature granted to Cape Colony by Letters Patent—Separate Church established on Consensual Basis—Application of Fund—Whether under altered circumstances payable to Archbishop of Cape Town—Cy-près application—Jurisdiction of Court—Income payable to Archbishop so long as Church in communion with Church of England.

In 1841 certain resolutions were agreed to by the clergy and laity in this country at a meeting convened by the Archbishop of Canterbury to raise a fund for the endowment of Bishoprics in the Colonies, the fundamental object being to found and endow Bishoprics in connection with the Church of England. Among the Colonies selected was the Cape of Good Hope. In 1847 a large sum was given to the fund, and amongst the specific purposes mentioned for its application was the endowment of a Bishopric at Cape Town. In June, 1847, a Bishop's Diocese was created for the Cape of Good Hope by Letters Patent, and Cape Town was constituted a Bishop's See. The Bishop appointed was to be under the Metropolitical See of Canterbury.

In 1849 part of the fund was invested on mortgage in the Colony and part laid out in the purchase of an estate in Cape Town for the use of the Bishop.

In the year 1850, a representative Legislature was granted to Cape Colony, and in 1853 by fresh Letters Patent a separate See of Cape Town was created.

In 1864, as the result of disputes concerning the effect of the Letters Patent of 1853, it was decided by the Privy Council in *In re the Lord Bishop of Natal* (1864) 3 Moo. P. C. (N. S.) 115, that as there was an independent legislative assembly in the Colony at the date when the Letters Patent of 1853 were granted, there was no power in the Crown by virtue of its prerogative to establish a Metropolitan See or Province whose status the Colony could be required to recognize.

As a result in February, 1870, the Church of the Province of South Africa was constituted on a consensual basis. In 1882, following further disputes, the Privy Council decided in *Merriman* v. *Williams* (1882) 7 App. Cas. 484 that the Church of the Province of South Africa was not a Church in connection with the Church of England as by law established.

Having regard to the fact that the present Archbishop of Cape Town was not a Bishop of the Church of England or of a Church in connection with the Church of England but was a Bishop of the Church of the Province of South Africa; and the doubt felt how the income of the fund should be dealt with, an originating summons was taken out by the present trustees of the fund raised in 1841 for the determination of the question how the income of the fund allocated to the endowment of a Bishopric at Cape Town should be applied, and whether the present Archbishop of Cape Town would be beneficially entitled to the income of the investments in this country held by the fund and set apart for the endowment of a Bishopric of Cape Town:—

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Held, that as it had been established that the present Archbishop of Cape Town was not a Bishop of the Church of England as by law established but a Bishop of the consensual Church of the Province of South Africa, which was, however, in communion with the Church of England, he was not a beneficiary of the funds in this country set apart for the endowment of the Bishopric of Cape Town. The question of a cy-près application of the fund thereupon arose.

Held further, therefore, that as the fund in question and the trustees were in this country, and the trusts relating to it established here, the Court had jurisdiction to order a scheme cy-près; and that the proper order was first to declare that on the true construction of the resolutions, the original trusts which affected the property were for the endowment of a Bishopric of Cape Town in connection with the Church of England, and those trusts had become impracticable; and then to direct the trustees in this country to pay the income in question now in their hands to the Archbishop of Cape Town for the time being appointed and recognized by the Church of the Province of South Africa, but only so long as that Church remained, in the Archbishop of Canterbury's opinion, in communion with the Church of England.

ORIGINATING SUMMONS.

These proceedings by way of originating summons were commenced by the present trustees of a charity called the Colonial Bishoprics Fund founded in the year 1841 for the purpose of obtaining a declaration (1.) that having regard to the constitution and objects of the above mentioned fund, the applicants (namely, the trustees) were at liberty to continue the payment to the present Bishop of Cape Town in South Africa (1) of the income of such part of the property of the above mentioned fund as had been allocated to the endowment of a Bishopric of Cape Town. (2.) Alternatively a declaration that the property so allocated ought to be applied cy-près, and a scheme accordingly.

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(1) The Bishop of Cape Town is also the Archbishop for the purposes of the Provincial Church in South Africa.

The facts are more fully set out in the judgment of the learned judge, but shortly stated are as follows :—

In the year 1841 the then Archbishop of Canterbury invited the clergy and laity in this country to attend a meeting for the purpose of "commencing a fund for the endowment of additional Bishoprics in the Colonies"; and in April a meeting was held and as a result certain resolutions were passed, one of them being to the effect that a fund be raised towards providing for the endowment of Bishoprics in such of the foreign possessions of Great Britain as should be determined upon by the Archbishops and Bishops of the United Church of England and Ireland.

On June 1, 1841, at a meeting of Archbishops and Bishops held in London certain declarations were agreed to and drawn up which (inter alia) were as follows : that they held it to be their duty in compliance with the resolutions of the previous April to undertake the charge of the fund for the endowment of additional Bishoprics in the Colonies and to become responsible for its application, and that they were of opinion that the immediate erection of Bishoprics was much to be desired, especially in (among other places) the Cape of Good Hope. They therefore appointed a standing committee with full powers to confer with the Ministers of the Crown and to arrange measures in concert with them for the erection of Bishoprics in the places therein enumerated.

On November 16, 1841, it was resolved by the standing committee that a sum of 10,000*l.* out of the general fund should be granted towards the endowment of each of two Bishoprics proposed to be erected, one of which was to be in the Cape of Good Hope, and that the British Government be asked to take steps for the erection of Episcopal Sees in (inter alia) the above mentioned Dependency. On March 11, 1843, the standing committee agreed that owing to certain circumstances the sum of 10,000*l.* voted to endow a See for the Cape of Good Hope should be transferred to another Colony. Shortly before the month of February, 1847, a sum of 35,000*l.* was contributed to the fund, and it was ascertained that this sum was intended to endow Sees at Adelaide and Cape Town.

On June 12, 1847, the standing committee resolved that the interest accruing on the 35,000*l.* should be added to capital for the benefit of the two new Dioceses. Of the sum of 35,000*l.*, 17,000*l.*, subsequently increased to 19,723*l.* odd, was allocated to the Bishopric of Cape Town; and of this latter sum, 10,000*l.* was sent to South Africa for investment and 9650*l.* was retained in this country, the balance being expended in costs. On June 25, 1847, the Diocese of Cape Town was created by Letters Patent and it was thereby (inter alia) declared that the Bishop of Cape Town and his successors should be subject to the Metropolitical See of Canterbury.

On May 14, 1849, at a meeting of the standing committee it was agreed that all the Archbishops and Bishops of the United Church of England and Ireland should form the committee to be called the Council for Colonial Bishoprics. In pursuance therefore of certain resolutions of the said committee held on May 14, 1849, a sum of 5050*l.* (being part of the capital set apart for the endowment of the See of Cape Town) was invested on mortgage in Cape Colony in the names of the treasurers and trustees of the fund, and on March 7, 1851, certain land at Protea in Cape Colony, now known as Bishops Court, was purchased as a residence for the Bishop and also conveyed to the treasurers and trustees of the fund. In 1853, the Diocese of Cape Town was by certain Letters Patent limited by the creation out of it of two new Dioceses.

At a meeting of the Colonial Bishoprics Council held on August 24, 1859, the former and present treasurers of the fund were authorized to execute a deed and other instruments for vesting the endowment fund in certain official trustees upon certain trusts. By the deed in question dated August 24, 1859, after reciting that certain sums being part of certain moneys contributed for the endowment of Colonial Bishoprics had been invested in the names of the treasurers of the fund as a permanent endowment for the Bishopric of Cape Town, and that the treasurers had executed a power of attorney for the transfer of the trust estate to the official trustees, it was agreed that the official trustees should stand possessed of the trust estate upon certain trusts. These trusts are more fully referred to in the judgment of the learned judge. In fact the deed was not acted upon until 1870.

In 1863 disputes arose in South Africa as to the effect of the Letters Patent of 1853, legal proceedings were taken, and it was ultimately held by the Privy Council in the case of *In re the Lord Bishop of Natal* (1) that, as there was an independent legislative assembly in the Colony at the date of the grant of the Letters Patent, there was no power in the Crown by virtue of its prerogative (without the sanction of Parliament) to establish a Metropolitan See or Province or to create an Ecclesiastical Corporation whose status the Colony could be required to recognize. As a result of this decision, the Church of the Province of South Africa was constituted in February, 1870, at a Provincial Synod convened in Cape Town, and articles of the constitution of the Church were approved and adopted.

In 1882 further questions arose with regard to certain Church property in South Africa, and the matter again ultimately came before the Privy Council, who in the case of *Merriman* v. *Williams* (2) held (inter alia) that the Church of the Province of South Africa was not a Church in connection with the Church of England as by law established. Subseqently various deeds were from time to time executed with regard to (inter alia) the property Bishops Court and the right to dispose of it by sale.

On December 11, 1930, the Council sanctioned rules for the administration of the Colonial Bishoprics Fund, and on June 5, 1931, the trustees of the fund were incorporated under the provisions of the Charitable Trustees Incorporation Act, 1872. Other deeds relating to the property and investments representing the moneys provided out of the Colonial Bishoprics Fund sent to South Africa were also from time to time executed, but in view of the learned judge's decision they are not material to be set out for the purposes of this report.

(1) 3 Moo. P. C. (N. S.) 115.

(2) 7 App. Cas. 484.

According to an affidavit of the Reverend P. S. Waddy, the Secretary of the Colonial Bishoprics Fund, it appeared that the income of the Cape Town Fund had been paid to the several Bishops of Cape Town and was still being paid to the present Bishop.

The applicants, as the trustees of the Colonial Bishoprics Fund, took the view that even though it was the fact that a particular form of episcopal supervision had ceased to be possible in the self-governing Colonies, yet it did not prevent the fund from adapting itself to the new conditions of a Church organized by members of the Church of England on a consensual basis, provided that its constitution followed that of the Church of England in matters of episcopal supervision and ordinance, and that such Church remained in communion with the Church of England and in all essentials was a part of the same. They therefore considered that in their opinion the Church of the Province of South Africa had fulfilled these conditions, and that the Bishop of the Church of the Province had supplied the needs for which the fund was founded, and they desired to pay him the income of the fund as entitled either under the original trusts or under a scheme sanctioned by the Court. An originating summons was accordingly taken out to have these questions determined as stated above.

F. H. L. Errington for the applicants. The history of this fund covers very many years, and the question of the relationship between the Church of England and the Church in South Africa has been the subject of judicial decision on numerous occasions. See the cases of *Long* v. *Bishop of Cape Town* (1); *In re the Lord Bishop of Natal* (2), which dealt with the right of the Crown by Letters Patent issued by virtue of its prerogative to establish an ecclesiastical See in a Colony possessing an independent legislative assembly: *Bishop of Natal* v. *Gladstone* (3); *The Bishop of Cape Town* v. *The Bishop of Natal* (4); *Merriman* v. *Williams.* (5)

(1) (1863) 1 Moo. P. C. (N. S.) 411.
(2) 3 Moo. P. C. (N. S.) 115.
(3) (1866) L. R. 3 Eq. 1.
(4) (1869) 6 Moo. P. C. (N. S.) 203.
(5) 7 App. Cas. 484.

[*H. O. Danckwerts* referred to Halsbury on the Laws of England, 2nd ed., vol. 11, p. 589, § 1044.]

Quite apart from the question now before the Court, these cases, it is submitted, show the intention of the Legislature since 1863 that what were set up were in fact separate Churches, although they are recognized as belonging to the Church of England. Compare, for instance, by way of analogy, the Welsh Church Act, 1914, s. 3, sub-s. 2; by that statute the ecclesiastical laws of England are considered as binding on the members of that Church on a consensual basis. The same analogy applies here.

It is submitted that the present Archbishop of Cape Town is the proper beneficiary of the fund, or at least is a person who can receive the income of the fund. These various resolutions regarding the fund are not definitions in the sense that the particular Church shall belong to the Established Church; there is no reference to the Church of England. All the terms used are of the most general nature and, although applicable to the Established Church of England, are equally applicable or at least can be adapted to the present state of things, these Provincial Churches having, so to speak, grown up.

As to the cy-près point, there are only two alternatives, either the Archbishop of Cape Town is a Bishop within the meaning of these various resolutions constituting the fund, or, if not, the only Bishop who comes within those resolutions is a Bishop of the Church of England as by law established appointed by Letters Patent, which at the relevant date was the way of appointing Bishops of the Established Church in the Colonies. See Lord Romilly's remarks in *Bishop of Natal* v. *Gladstone.* (1)

[LUXMOORE J. If on the true construction of the resolutions, I hold that the beneficiary under the fund is a Bishop of the Church of England as by law established appointed by Letters Patent, the position would arise that no such Bishop could ever be appointed again. Letters Patent no longer now run in a Colony which has been given legislative authority.]

Yes. They are no longer issued.

(1) L. R. 3 Eq. 1, 33, 54.

J. V. Nesbitt for certain churches in South Africa (the Church of England in South Africa) in opposition to the proposed application of the fund.

Undoubtedly at the date when this Bishopric of Cape Town was created in 1847, it is beyond question but that the churches in South Africa now appearing in opposition to the applicants' suggested application of the fund were entitled with similar churches to the benefit of this endowment. These churches and also the other churches in existence in the diocese of Cape Town were part of the Church of England in South Africa; they were not another distinct body at all. The fact that in 1850 a legislative government was granted by the Crown to the Cape Colony does not matter; it is submitted that those churches which did not join the new Church still remained part of the Church of England in South Africa. The grant of legislative authority did not affect the position of these churches in that respect. It might have to a certain extent affected the legal status of the Church. But it never was a Church by law established in South Africa. The Church of the Province of South Africa was not a necessary result of the grant of legislative authority to the Cape Colony.

Though there was a consensual Church after that, there was nothing to prevent the consensual Church still remaining a Church in connection with the Church of England as by law established. In *Merriman* v. *Williams* (1) the Privy Council held that the new Church adopted other standards and disconnected themselves from the Church of England.

[LUXMOORE J. But they were recognized by the Church of England here as remaining in communion with the Church.]

That simply means a Church summoned by invitation to the Lambeth Conference; it is apprehended that the phrase "in communion with the Church of England" must have been in existence before the Lambeth Conference was first held in 1867. See Halsbury's Laws of England, 2nd ed., vol. 11, pp. 573, 574, paras. 1014, 1015.

When this new Church in South Africa adopted the standards of faith and doctrines which were not in connection with the

(1) 7 App. Cas. 484.

Church of England, these old churches now opposing the scheme remained the only Churches in South Africa which were part of the Church of England, and were, it is submitted, undoubtedly the Churches for the benefit of whom this endowment was originally created. When Bishop Gray was appointed to Cape Town, these churches did not object to the income of this endowment being paid to him; to some extent they obtained a benefit, because that Bishop, in addition to his being a Bishop of this Church of the Province, was also a Bishop of the Church of England, having been consecrated as such by the Archbishop of Canterbury. He was a Bishop in both Churches, and being a Bishop of the Church of England, these churches felt that they were able to accept his ministrations. The same observations apply to his two successors. In 1930, however, when Archbishop Phelps was appointed those considerations did not apply. He had not been consecrated a Bishop by the Archbishop of Canterbury, and he was not a Bishop of the Church of England. It is submitted therefore that the differences that have arisen were really not caused by the fact that legislative authority was granted to South Africa but by reason of the fact that when this new Church was founded on a consensual basis it deliberately adopted certain standards of faith and doctrine which had the effect of disconnecting it from the Church of England: *Merriman* v. *Williams.* (1)

It has been suggested in some of the cases that the effect of these Letters Patent of 1853 was nugatory, but the Courts have not accepted that view. The position shows clearly that it is not the giving of legislative authority which effects this disconnection but the deliberate action of the persons who were responsible for founding the Church: *Bishop of Natal* v. *Gladstone* (2); *In re the Lord Bishop of Natal.* (3) It would still be possible in law for the Crown and the Archbishop of Canterbury to establish a Bishop of Cape Town notwithstanding the fact that legislative authority had been given to that Colony, and for him to be recognized by all the members of the Church of England in South Africa as a Bishop. The evidence is somewhat scanty, but the only fund really which endowed the Bishopric of Cape Town was the fund contributed by the Baroness Burdett-Coutts in 1847.

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(1) 7 App. Cas. 484, 506, 507.

(2) L. R. 3 Eq. 1.

(3) 3 Moo. P. C. (N. S.) 115, 148.

[LUXMOORE J. If there is no one to answer the exact description of the cestui que trust, it will have to be applied cy-près.]

[Reference was made to *Darroll and Another* v. *Tennant and Another.* (1)]

It is submitted that the churches now represented were clearly beneficiaries under this trust at the time of its inception, and through no fault of their own, another Church has definitely broken away from the doctrines which they all along accepted. Originally both these Churches were benefited by this endowment, which was originally for the members of the Church of England in South Africa.

On a fair reading of the resolutions passed on April 27, 1841, it seems reasonably clear that the objects of this fund were to be members of the Church of England, and no doubt they were to be benefited by having Bishops appointed in each particular Colony. Secondly, Archbishop Phelps is not a Bishop of the Church of England. Thirdly, the granting of legislative authority to Cape Colony did not prevent the original trust from being continued to be carried on. The decision of the Privy Council in *Merriman* v. *Williams* (2) clearly shows that a Church could have been formed which would have been in connection with the Church of England, but that the Church of the Province of South Africa deliberately took steps to effect a disconnection. If this income is paid to Archbishop Phelps, the result will be that income which was intended for the benefit of members of the Church of England and only for members of the Church of England will be applied for the benefit of another Church, and it will also have the effect of depriving persons who are members of the Church of England in South Africa from receiving any benefit from this income.

As regards the possible application of a scheme cy-près.

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(1) [1932] C. P. D. (S. A. L. R.) 406.

(2) 7 App. Cas. 484, 506, 507.

First, it is submitted that a doubt exists whether the Court has jurisdiction to make any such order.

It is a foreign charity, because all the objects of the charity are abroad. This income could not be applied to any other than a Bishop in Cape Colony.

Secondly: even assuming that the Court comes to the conclusion that there is jurisdiction to make any such order, it is submitted that this is not a case in which that jurisdiction ought to be exercised at the present time. The proceedings in South Africa regarding the application of part of the funds of this endowment contemplate a cy-près scheme, and there ought not to be a position in which it is possible that the Court in England would make one cy-près scheme with regard to part of the funds and the Court in South Africa would make a different scheme. However, if the Court should hold that it is a proper case for a cy-près scheme, then—inasmuch as the objects of the charity are abroad—it would be possible for the Court to direct the Attorney-General or the trustees to apply in South Africa for a scheme cy-près: see Tudor on Charities, 5th ed., p. 185; *Forbes* v. *Forbes* (1); *Attorney-General* v. *Fraunces* (2); *In re Fraser* (3); *In re Robinson.* (4)

Further, if the Court should decide that some cy-près scheme should be directed, the position of the churches now represented should be taken into consideration. They or their predecessors in title were clearly some of the original objects of this charity. Their present position is somewhat curious; perhaps the Bishop of London has some sort of jurisdiction as to sending out a Bishop to administer to them.

[*F. H. L. Errington* referred to Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1770.]

A Bishop could of course be sent out as occasion arose. These churches have done nothing to render them unsuitable objects of this charity, and they are still of the same faith which they had at the time the charity was established. It is submitted that a scheme could be sent to Chambers to deal with this point; and if a scheme cy-près is ordered, some part of the income should be available for them at any rate. They are original objects of the charity, and have done nothing to debar themselves from receiving the benefit of this endowment.

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(1) (1854) 18 Beav. 552.

(2) (1866) W. N. 280.

(3) (1883) 22 Ch. D. 827.

(4) [1931] 2 Ch. 122.

H. O. Danckwerts for the Attorney-General. It is not desired to oppose the view put forward on behalf of the applicants. It is suggested that if the present Archbishop of Cape Town should be held not to be the proper beneficiary to receive the income and the charity were to be left without any beneficiary, then the Court would have to proceed on much the same footing as that on which the Privy Council proceeded in *Merriman* v. *Williams* (1)—namely that the practice now is at any rate not to appoint further Bishops in the Dominions that have responsible government. On that footing the position is that the trusts have become impracticable, and if that is so, the cy-près application is let in. The Court of course can direct a scheme; it has ample jurisdiction. The trustees and the fund are both in this country. Whatever happens the payment of the income should not be divided. If the matter comes to a cy-près application, a simple order directing payment to the Bishop for the time being would meet the case.

[A suggested form of order directing a scheme was discussed.]

[LUXMOORE J. The land in South Africa is not being dealt with, but it may be right to say that such part of the property as has been allocated to the endowment of the Bishopric be held by the trustees in trust to pay the income to the Bishop of Cape Town.]

J. V. Nesbitt. On this proposed order, it is suggested that the Court should not deal with this summons at all. This application is subsequent to the application in South Africa, and any order made will forestall any order made by the judge in South Africa.

It is submitted that the Protea estate in Cape Town is in the same position as the other funds.

The funds representing the mortgages (which have now

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(1) 7 App. Cas. 484.

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been realized) and the Protea estate are on the same footing, and it is submitted that the Court should not make an order which will affect the position of the land and these investments, the subject of the proceedings in South Africa.

F. H. L. Errington in reply. If an order cy-près is made, the applicants would agree to the order suggested. But be that as it may, it is submitted that the Archbishop of Cape Town is a Bishop within the contemplation of the resolutions which are the foundation of the Church. The real question here is whether, when dealing with these charitable trusts, a Bishop of the Church of the Province of South Africa comes within those trusts. These resolutions, while retaining the principles of espiscopal government and the general framework of the Church of England, left a wise latitude to the Archbishops and Bishops who were in charge and had the application of the fund with reference to the particular Bishop who ought to be subsidized or provided for out of the fund.

Cur. adv. vult.

1934. July 25. LUXMOORE J. On May 15, 1933, the trustees of the Colonial Bishoprics Fund Registered applied to this Court by originating summons, intituled "In the Matter of the Charity called or known as the Colonial Bishoprics Fund founded in the year 1841, and In the Matter of the Charitable Trusts Acts 1853 to 1925" for "A declaration that having regard to the constitution and objects of the above mentioned Fund the applicants are at liberty to continue the payment to the present Bishop of Cape Town in the Province of South Africa of the income of such part of the property of the above mentioned Fund as has been allocated to the endowment of a Bishopric of Cape Town. (2.) Alternatively a declaration that the property so allocated ought to be applied cy-près and a scheme accordingly."

His Majesty's Attorney-General was in the first instance the only respondent to the summons. The matter came before me first on November 2, 1933. Shortly after the case was opened by Mr. Errington, I suggested that, having regard to the litigation which he stated was pending in the Supreme Court of South Africa on behalf of the congregations of certain churches in the diocese of Cape Town, known respectively as Trinity Church, Cape Town, St. John's Church, Wynberg, and St. Peter's Church, Mowbray, it was advisable before dealing with the matter to ascertain if persons representing those congregations were desirous of being heard.

The matter stood over, and in the result it was ascertained that certain persons desired to be heard in opposition to the summons. Evidence was filed on their behalf, and in due course these persons were represented before me by Mr. J. V. Nesbitt. At the hearing I directed that the summons should be amended by adding those persons as respondents. Mr. Nesbitt presented his clients' case with care and moderation, and I take this opportunity of expressing my indebtedness to him for the assistance he has given me in the solution of questions which appear for many years past to have been and still to be the source of acute controversy in South Africa.

The plaintiffs in the proceedings pending in South Africa, the short title whereof is *Mills* v. *Brink* (*Registrar of Deeds*) *and others*, are therein described as members of the Church of England; two of them being churchwardens of Trinity Church, Cape Town, two others being churchwardens of St. John's Church, Wynberg, and the others being churchwardens of St. Peter's Church, Mowbray. The object of these proceedings is in substance to prevent certain immovable property situate in the Cape Colony, known as the Protea estate, called Bishops Court, and certain investments in that colony and the income thereof, from being applied for the use and benefit of the present Archbishop of Cape Town, on the ground that he is not a beneficiary under the trusts affecting the property and investments in question. The original defendants to the action, in addition to the Registrar of Deeds at Cape Town, were a Mr. David Tennant, who was sued in his personal capacity and also as Registrar of the Diocese of Cape Town of the Church of the Province of South Africa, the present Archbishop of Cape Town and

Metropolitan, and the Dean of the Church of the Province of South Africa.

It is common ground that at the time when the proceedings to which I have referred were begun in South Africa, Bishops Court was being used as the residence of the Archbishop of Cape Town; and the income derived from the Protea estate and from the investments to which I have already referred, as well as certain parts of the income of the Colonial Bishoprics Fund in this country, was being paid to the Archbishop of Cape Town. The proceedings in South Africa have recently been amended by adding as defendants the Colonial Bishoprics Fund, the applicants in the present proceedings.

The questions to be decided in the proceedings before me are confined to the income of such part of the property allocated to endowment of a Bishopric of Cape Town as are held by or may come to the Colonial Bishoprics Fund in this country.

The first question to be determined is whether under the trusts affecting the fund, any person, who for the time being holds the dignity of the Archbishop of Cape Town, is beneficially entitled to the income of the investments in this country held by the Colonial Bishoprics Fund and set apart to form part of the endowment of the See of Cape Town, although he is not a Bishop of the Church of England or of a Church in connection with the Church of England but is a Bishop of the Church of the Province of South Africa. If the question is answered in the affirmative, no further question arises ; but if it is answered in the negative a further question falls to be determined, namely—whether the income of the property in question ought to be applied cy-près. In the event of an affirmative answer to this question, the applicants ask the Court to settle and approve an appropriate scheme.

The answer to the first question necessarily involves a consideration of the resolutions passed at the time the Colonial Bishoprics Fund was established and certain cases which have since been decided in the Privy Council.

In the year 1841 the then Archbishop of Canterbury invited the clergy and laity in this country to attend a meeting on April 27 of that year for the purpose "of commencing a Fund for the endowment of additional Bishoprics in the Colonies." The reason for the invitation was stated to be the desire of the Archbishop to remedy "the defective provision hitherto made for planting the Church in the distant dependencies of the British Empire," and the desire "that an effort should be made to extend to them the full benefit of apostolic government and discipline." It is obvious I think that the "Church" referred to in the invitation was the Church of England. The meeting was duly held and at it certain resolutions were passed. The resolutions are material and were as follows:—

"(1.) That the Church of England, in endeavouring to discharge her unquestionable duty of providing for the religious wants of her members in foreign lands, is bound to proceed upon her own principles of Apostolical order and discipline.

"(2.) That the want of Episcopal superintendence is a great and acknowledged defect in the religious provision hitherto made for many of the Colonies and dependencies of the British Crown.

"(3.) That the acquisition of new Colonies, and the formation of the British communities in various parts of the world, render it necessary that an immediate effort should be made to impart to them the full benefit of the Church, in all the completeness of her ministry, ordinances and government.

"(4.) That a Fund be raised towards providing for the endowment of the Bishoprics in such of the foreign possessions of Great Britain as shall be determined upon by the Archbishops and Bishops of the United Church of England and Ireland; that their Lordships be requested to undertake the charge and application of the Fund, and to name a Treasurer or Treasurers, and other such Officers as may be required for conducting the necessary details." These resolutions are the primary source from which the trusts affecting the Colonial Bishoprics Fund are to be ascertained.

It is in my judgment plain from a consideration of the resolutions that the "Church" therein referred to is the Church of England. The first resolution expressly mentions the Church of England and emphasizes the duty of that "Church" to provide for the wants of her members abroad by proceeding upon her own principles of apostolic order and discipline. This refers to the constitution of Bishoprics and the consecration of Bishops of the Church of England under the ordinances and government of that Church. The second resolution calls attention to the defect in the religious provisions made up to that time in the colonies and dependencies of the Crown by the failure to provide episcopal superintendence. The failure referred to is obviously that of the Church of England. The third resolution stresses the necessity for immediate effort so as to afford the British communities in various parts of the world "the full benefit of the Church in all the completeness of her ministry, ordinances and government." There can be no doubt that the "Church" there referred to is the Church of England. The fourth resolution provides for the establishment of a fund for the endowment of Bishoprics in such foreign possessions of Great Britain as shall be determined upon by the Archbishops and Bishops of the United Church of England and Ireland. It is true that in this resolution there is no limitation in express terms to confine the Bishoprics to be endowed to Bishoprics under the Church of England, but, reading the resolutions as a whole, I have no doubt that the fundamental object was the foundation and endowment of Bishoprics in connection with the Church of England. The fourth resolution further provides for the "charge and application of the Fund" and for "the conduct of the necessary details." This no doubt is sufficient to authorize the definition of rules and regulations for the administration of the fund and its safe custody, investment and appropriation to particular Bishoprics. But there is nothing in this resolution or any of the other resolutions to justify a departure from what I have called the fundamental object.

On June 1, 1841, a meeting of Archbishops and Bishops was held at Lambeth Palace; and as the result, an agreed declaration was drawn up and approved by all present. This declaration was subsequently subscribed by a large number of Bishops who were not at the meeting. The declaration is in these terms: "We the undersigned Archbishops and Bishops of the United Church of England and Ireland, contemplate with deep concern the insufficient provision which has been hitherto made for the spiritual care of the members of our National Church residing in the British Colonies, and in distant parts of the world, especially as it regards the want of a systematic superintendence of the Clergy, and the absence of those ordinances, the administration of which is committed to the Episcopal Order. We therefore hold it to be our duty, in compliance with the resolutions of a meeting convened by the Archbishop of Canterbury, on April 27 last, to undertake the charge of the Fund for the endowment of additional Bishoprics in the Colonies, and to become responsible for its application. On due consideration of the relative claims of those dependencies of the Empire which require our assistance, we are of opinion, that the immediate erection of Bishoprics is much to be desired in the following places:—New Zealand, The British Possessions in the Mediterranean, New Brunswick, Cape of Good Hope, Van Diemen's Land, Ceylon. When competent provision shall have been made for the endowment of these Bishoprics, regard must be had to the claims of . . . . ,"—and then follow the names of other colonies and dependencies—." In the first instance, we propose that an Episcopal See be established at the seat of Government in New Zealand, offers having been already made which appear to obviate all difficulty as to endowment. Our next object will be to make a similar provision for the congregations of our own communion, established in the Islands of the Mediterranean, and in the countries bordering upon that Sea; and it is evident that the position of Malta is such as will render it the most convenient point of communication with them, as well as with the Bishops of the ancient Churches of the East, to whom our Church has been for many centuries known only by name." The declaration proceeds with regard to the proposition to fix a See at Valletta with a jurisdiction which is to extend "to all the Clergy of our Church residing within the limits above specified." The declaration continues: "In no case shall we proceed without the concurrence of Her Majesty's Government; and we think it expedient to appoint a Standing Committee." Then the names of the Archbishops and Bishops who are to form that standing committee are set out, "with full powers to confer with the Ministers of the Crown, and to arrange measures in concert with them, for the erection of Bishoprics in the places above enumerated."

The Church referred to in this declaration is plainly the Church of England, and I can find nothing in it which is at variance with or purports to alter or affect in any way the fundamental object with which the fund was established. It is to be observed that at the date of this declaration, the right to a representative Legislature had not been granted in respect of any of the Colonies or areas mentioned therein.

On November 16, 1841, the standing committee appointed by the Archbishops and Bishops resolved that a sum of 10,000*l.* out of the general fund should be granted towards the endowment of each of the two Bishoprics proposed to be erected in New Brunswick and the Cape of Good Hope. The Archbishop of Canterbury was thereby requested to convey to Her Majesty's Government "their earnest prayer that Her Majesty might be advised to cause measures to be taken for the erection of Episcopal Sees in the above mentioned Dependencies." At a meeting of the standing committee held on March 11, 1843, it was agreed that: "as there seems to be no immediate prospect of being able to provide adequately for a Bishop at the Cape of Good Hope, the sum of 10,000*l.* originally voted for the endowment of a See in the latter colony be transferred to the endowment fund of New Brunswick."

In the year 1847, the Baroness Burdett-Coutts contributed a sum of 35,000*l.* to the fund. Some correspondence passed at this time between the donor and the Archbishop of Canterbury. This correspondence has been lost, and it is now impossible to ascertain whether any and what conditions were by that correspondence attached to the gift. It appears however to be plain from a resolution passed at a meeting of the standing committee of the fund held on May 7, 1847, that the gift was earmarked for the specific purpose of providing an endowment for the Bishoprics of Adelaide and Cape Town. On June 12, 1847, the standing committee resolved that the interest accruing on the 35,000*l.* should from the day of its investment to the day of consecration be added to the capital for the benefit of the proposed two Dioceses of Adelaide and Cape Town, and that the Bishops of those two Dioceses should be authorized to draw on the Treasurers of the fund at the rate of 800*l.* a year. Of the said sum of 35,000*l.*, 17,000*l.* appears to have been allocated to the Bishopric of Cape Town. This sum was subsequently increased to 19,723*l.* 13*s.* 2*d.* by small additions from various sources, some of which cannot now be identified. Of this, 10,000*l.* was sent to South Africa for investment and 9650*l.* was retained in this country, the balance being expended in costs.

On June 25, 1847, a Bishop's See or Diocese was created by Letters Patent granted under the Great Seal by Her late Majesty Queen Victoria in the Colony or Settlement of the Cape of Good Hope and the Island of St. Helena under the title of the Bishopric of Cape Town. By the same Letters Patent, Robert Gray was appointed to be ordained and consecrated Bishop of the See of Cape Town, and he was thereby constituted a perpetual corporation with perpetual succession. The town of Cape Town was thereby constituted a Bishop's See. It was further declared that the Bishop of Cape Town and his successors should be subject and subordinate to the Metropolitical See of Canterbury and to the Archbishops thereof in the same manner as any Bishop of any See within the Province of Canterbury in England is under the Metropolitical See and the Archbishop thereof. The Bishop of Cape Town was further given the jurisdiction and rights of visitation within his diocese as are usual in the case of an English Bishop, with the usual officers and a right of final appeal to the Archbishop of Canterbury.

At a meeting of the standing committee held on June 23, 1848, it was agreed that until permanent investments could be made in the colonies for the several Bishoprics, the capital of the Colonial Bishoprics Fund invested in home securities should be considered as a general fund applicable to the production of the income required.

On May 14, 1849, it was agreed that from thenceforward all the Archbishops and Bishops of the United Church of England and Ireland should form the committee to be called the Council for Colonial Bishoprics, and it was agreed that an investment on mortgage within the colony should be made of part of the capital set apart for the endowment of the See of Cape Town, and also that a sum of 2000*l.* or 3000*l.* should be invested in the purchase of an estate at Protea or elsewhere for the Bishop's residence and a college, this estate to form part of the property of the See. In pursuance of these resolutions a sum of 5050*l.* was invested in mortgages in Cape Colony, which were taken in the names of the treasurers and trustees of the fund. On March 7, 1851, the estate at Protea, now known as Bishops Court, Cape Town, the subject of the proceedings pending in South Africa to which I have already referred, was purchased at the price of 3100*l.*, the conveyance being made to the treasurers and trustees.

In the year 1850, a representative Legislature was granted to Cape Colony.

In 1851 and 1852, Bishop Gray made proposals for the division of the Diocese of Cape Town constituted under the Letters Patent of 1847 into three distinct Bishoprics—namely, Cape Town, Grahamstown and Natal. These proposals were accepted, and, with the avowed object of carrying them into effect, Bishop Gray resigned the Bishopric conferred on him by the 1847 Letters Patent. On December 8, 1853, fresh Letters Patent were granted purporting to limit the Diocese of Cape Town by the creation of two new Dioceses of Grahamstown and Natal, Bishop Gray being appointed Bishop of the reconstructed Diocese of Cape Town and Metropolitan, with the same corporate character and capacity as had been conferred on him by the 1847 Letters Patent. The endowments of the two new Dioceses were provided by the Colonial

Bishoprics Fund. At a meeting of the standing Council held on August 24, 1859, it was resolved that "as it was expedient that the endowment fund of the Bishopric of Cape Town should be vested in the following official trustees, namely, the Bishop of Cape Town, the Dean of Cape Town, the senior Archdeacon, and the registrar of the Diocese, upon the trusts of an indenture dated August 24, 1859, the treasurers of the Colonial Bishoprics Fund should be requested and authorised to execute the said indenture and all such other instruments as might be necessary for vesting the said endowment fund in the said official trustees upon the trusts of that indenture." The said indenture contained recitals to the effect that 8150*l.*, part of certain moneys contributed by voluntary public subscription for the endowment of Colonial Bishoprics, had, under the direction of the Colonial Bishoprics Council, been invested in the names of the treasurers of the fund as a permanent endowment for the Bishopric of Cape Town, and that the treasurers of the fund had executed a power of attorney for the transfer of the said trust estate to the said official trustees, and declared (among other things) that the official trustees should stand possessed of the trust estate upon trust to continue the same as then invested, or to sell the said trust estate or any part thereof and invest the proceeds in the purchase of freehold land in the Colony of the Cape of Good Hope or on the mortgage of freehold land within the same, and that the net income of the trust estate should be paid to the Bishop of Cape Town for the time being, who should also be entitled to the use and occupation of Bishops Court. It was further provided that the Council for Colonial Bishoprics might by resolution from time to time authorize any one or more of the members of the Council to revoke by deed all or any of the trusts thereby declared and to declare by deed new trusts to be expressed in such resolution concerning the trust estate or any part thereof, provided that the new trusts should be for the endowment of the Bishopric of Cape Town or of some Bishopric or Bishoprics within the then limits of or including part of the then Diocese of Cape Town. This deed was not in fact acted on until 1870.

LUXMOORE J.

1934

THE COLONIAL BISHOPRICS FUND, 1841, AND THE CHARITABLE TRUSTS ACTS, 1853 TO 1925, *In re.*

It is difficult to understand what power the Colonial Bishoprics Council had to enter into this deed, for the original trusts declared in respect of the fund do not appear to have conferred any power on the Council to vary the trusts, whether by appointing separate trustees of any part of the fund or by substituting other and different trusts for all or any of the original trusts.

In 1863 disputes arose in South Africa as to the effect of the Letters Patent of 1853. These disputes arose with regard to certain ecclesiastical offences alleged to have been committed by the then Bishop of Natal, who had been appointed to that Bishopric by the said Letters Patent. The disputes were ultimately brought before the Privy Council by way of appeal from the decision of the South African Courts: see *In re the Lord Bishop of Natal.* (1) The Privy Council held among other things that, as there was an independent Legislative Assembly in the Colony at the date when the Letters Patent of 1853 were granted, there was no power in the Crown by virtue of its prerogative to establish a Metropolitan See or Province or to create an Ecclesiastical Corporation whose status, rights and authority the Colony could be required to recognize. In this connection the Lord Chancellor, who delivered the judgment of the Privy Council, said: "We apprehend it to be clear, upon principle, that after the establishment of an independent Legislature in the settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its Prerogative (for these letters patent were not granted under the provisions of any Statute) to establish a metropolitan see or Province, or to create an ecclesiastical corporation whose status, rights, and authority the Colony could be required to recognize. After a Colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or settlement as it does to the United Kingdom. It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a Bishop, but it has no power to assign him any diocese, or give him any sphere of action within the United Kingdom. The United Church of England and Ireland is not a part of the Constitution in any Colonial settlement, nor can its authorities or those who bear office in it claim to be recognized by the law of the Colony, otherwise than as the members of a voluntary association."

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(1) 3 Moo. P. C. (N. S.) 115, 148, 151.

Later on he said : " We, therefore, arrive at the conclusion that although in a Crown Colony, properly so called, or in cases where the letters patent are made in pursuance of the authority of an Act of Parliament (such for example as the Act of the 6 and 7 Vict. c. 13), a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the letters patent of the Crown will not have any such effect or operation in a Colony or settlement which is possessed of an independent Legislature."

As the result of this decision steps were taken to organize the members of the existing congregations in South Africa on a consensual basis, and in February, 1870, the Church of the Province of South Africa was constituted at a Provincial Synod convened by Bishop Gray and held in Cape Town. Articles of the Constitution of this Church were approved and adopted. The first of these Articles states that " The Church of the Province of South Africa, otherwise known as the Church of England in these parts, First . . . . receives and maintains "—among other things—" the Doctrine, Sacraments and Discipline of Christ, as the same are contained and commanded in Holy Scripture, according as the Church of England has set forth the same in its Standards of Faith and Doctrine ; and it receives the Book of Common Prayer, and of Ordering of Bishops, Priests and Deacons, to be used, according to the form therein prescribed, in Public Prayer and Administration of the Sacraments and other Holy Offices ; and it accepts the English version of the Holy Scriptures as appointed to be read in Churches ; and, further, it disclaims for itself the right of altering any of the aforesaid Standards of Faith and Doctrine. Provided that nothing herein contained shall prevent the Church of this Province from accepting, if it shall so determine, any alterations in the Formularies of the Church (other than the Creeds) which may be adopted by the Church of England, or allowed by any General Synod, Council, Congress or other Assembly of the Churches of the Anglican Communion; or from making at any time such adaptations and abridgements of, and additions to, the Services of the Church, as may be required by the circumstances of this Province: Provided that all changes in, and additions to, the Services of the Church, made by the Church of this Province, shall be liable to revision by any General Synod of the Anglican Communion, to which this Province shall be invited to send representatives. Provided also, that in the interpretation of the aforesaid Standards and Formularies, the Church of this Province be not held to be bound by decisions, in questions of Faith and Doctrine, or in questions of Discipline relating to Faith or Doctrine, other than those of its own Ecclesiastical Tribunals, or of such other Tribunal as may be accepted by the Provincial Synod as a Tribunal of Appeal."

Bishop Gray died on September 1, 1872, and on May 17, 1874, the Rev. William West Jones was under Royal Mandate consecrated Bishop of Cape Town and Metropolitan by the then Archbishop of Canterbury. On this occasion a modification of the oath of due obedience was allowed.

In 1882 questions arose with regard to certain church property in South Africa which were litigated in the South African Courts and were ultimately determined by the Privy Council: see *Merriman* v. *Williams*. (1) The Privy Council held that the Church of the Province of South Africa was not a Church in connection with the Church of England as by law established. Sir Arthur Hobhouse in the course of his judgment referred to the Article of the Constitution which I have already read, and said: "There are in this article and in other parts of the synodical proceedings general expressions affirming in the strongest way the connection of the Church of South Africa with the Church of England, and its adherence to the faith and doctrine of the

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(1) 7 App. Cas. 484, 509, 510, 511.

Church of England. But all these general expressions are unavailing for the present purpose, if on coming to particulars we find that the constitution substantially excludes portions of the faith and doctrine of the Church of England. The trusts of the property in dispute are declared by the Ordinance of 1839, and the grant of June, 1849, in favour of persons belonging to the United Church of England and Ireland as by law established. But the standards of faith and doctrine adopted by that Church are not to be found only in the texts. They are to be found also in the interpretation which those texts have from time to time received at the hands of the tribunals by law appointed to declare and administer the law of the Church. It has been argued that the Church of South Africa has here done all that existing political circumstances permitted it to do for continued connection with the Church of England; and again, that the proviso is a mere statement of the facts of the case, and means no more than this: that as the Church of South Africa must have tribunals of its own, it hereby places on record that their decisions should be binding. The necessity of separate tribunals and its probable consequences has been above dealt with. But their Lordships consider that the proviso under consideration is very much more than a recognition of the facts of the case; and that the Church of South Africa, so far from having done all in its power to maintain the connection, has taken occasion to declare emphatically that at this point the connection is not maintained. It was competent to the Church of South Africa to establish for itself any system of law which it thought fit. The facts of the case did not compel it to say that its tribunals shall not take English decisions as authoritative. It might have declared that the decisions of the tribunals established by law for the Church of England, whether past or future, should be binding on the tribunals of the Church of South Africa. That would probably keep the two Churches in connection for the longest period of time, though it would not be necessary to go so far in order to maintain the connection at the outset. But the obvious course for a Church which desired to be in connection with the Church of England to all intents and purposes would be at least to say at starting that its faith, doctrine, and discipline should be those which then prevailed in the Church of England. Such a Church would, until some fresh departure occurred, be in connection with the Church of England. Their Lordships were strongly invited by the respondent's counsel to connect the proviso under consideration with the course of some well-known controversies. There is no judicial ground for saying that it was aimed at any special practice or doctrine. But its practical effect may well be illustrated by reference to some important decisions of Her Majesty in Council. For instance, the decisions in the cases of *Gorham* v. *Bishop of Exeter* (1) and *Williams* v. *Bishop of Salisbury* (2), both delivered prior to the Synod of 1870, affirm and secure the right of a clergyman of the Church of England to preach freely the doctrines which were there in question; but in the Church of South Africa a clergyman preaching the same doctrines may find himself presented for, and found guilty of, heresy. Such a reservation on the part of the Church of South Africa must tend to silence and to exclude those whom the decisions of Her Majesty in Council would protect in the Church of England. The decisions referred to form part of the constitution of the Church of England as by law established, and the Church and the tribunals which administer its laws are bound by them. That is not the case as regards the Church of South Africa. The decisions are no part of the constitution of that Church, but are expressly excluded from it. There is not the identity in standards of faith and doctrine which appears to their Lordships necessary to establish the connection required by the trusts on which the Church of St. George is settled. There are different standards on important points. In England the standard is the formularies of the Church as judicially interpreted. In South Africa it is the formularies as they may be construed without the interpretation. It is argued that the divergence made by the Church of South Africa is only potential and not actual, and that we have no right to speculate on its effect until the tribunals of South Africa have

(1) Moore's Rep. of Case (Ed. 1852). (2) (1863) 2 Moo. P. C. (N. S.) 375.

shewn whether they will agree or disagree with those of England. Their Lordships think that the divergence is present and actual. It is the agreement of the two Churches which is potential. The ecclesiastical tribunals of South Africa may possibly decide in all important points as Her Majesty in Council has done. But the question is whether they have the same standard; and, as has been shewn, they have a different standard. Of course, it was perfectly competent to the Church of South Africa to take up its own independent position with reference to the decisions of the tribunals of the Church of England. But, having chosen that independence, they cannot also claim as of right the benefit of endowments settled to uses in connection with the Church of England as by law established."

Archbishop West Jones died on May 21, 1908, and in the same year William Marlborough Carter, the then Bishop of Zululand (as Bishop of which Diocese he had been consecrated by the Archbishop of Canterbury), was chosen by the Church of the Province of South Africa to be Bishop of Cape Town and Metropolitan, and was collated to that See by the Bishops of the Province in the year 1909. Archbishop Carter resigned in November, 1930, and Francis Robinson Phelps, then Bishop of Grahamstown, to which Bishopric he had been consecrated by Archbishop Carter, was duly chosen by the Church of the said Province of South Africa to succeed Archbishop Carter and was collated by the Bishops of the said Province to the See of Cape Town.

Various deeds have from time to time been executed with regard to the property and investments representing the moneys provided out of the Colonial Bishoprics Fund sent to South Africa in pursuance of the resolution passed at the meeting of the Council of Colonial Bishops held on May 14, 1849. In addition, certain rules and regulations for the administration of the fund and defining its objects have been sanctioned; but, in view of the conclusion at which I have arrived, it is unnecessary to consider the provisions of these deeds or the said rules and regulations or to say anything about them except that it is at least doubtful whether they have any validity, if and so far as they purport to vary any of the original trusts in respect of the fund.

It is I think established by the cases to which I have already referred that the present Archbishop of Cape Town is not a Bishop of the Church of England as by law established. He is a Bishop of the Church of the Province of South Africa, the consensual Church established by members of the Church in South Africa in connection with the Church of England at the date of the establishment of the Provincial Church. It may be that those members of the congregations which refused to join the Church of the Province of South Africa still remain in connection with the Church of England, but it is I think plain that there is in South Africa no body which can properly be described as the Church of England as by law established, and it is equally plain that there is no Diocese or Bishop of Cape Town in connection with those congregations, or with any congregations or Church other than the Church of the Province of South Africa.

It follows from what I have said that in my judgment the present Archbishop of Cape Town is not a beneficiary of the funds in this country set apart for the endowment of the Bishop of Cape Town. Nor does it seem practicable that any new Diocese of Cape Town in connection with the Church of England can now be established. The practice adopted until the year 1866 for the creation of a Colonial Diocese and the appointment of a Bishop thereof appears to have been by Letters Patent granted by the Crown on the advice of the Imperial Government: see *Bishop of Natal* v. *Gladstone* (1); but since 1866 the practice has ceased and the Crown no longer grants Letters Patent creating Dioceses or appointing Bishops in any Dominion or Colony with representative legislative authority. So long as this position continues, it is impossible to establish a Diocese of Cape Town for a consensual Church in connection with the Church of England; and it is at least unlikely that a Bishop of the Church of England of such consensual Church would be appointed. Even if such an appointment should be made, the Bishop so appointed would not be a Bishop of the Diocese of Cape Town. It was laid down in *In re the Lord Bishop of Natal* (1) that such a Diocese could not be legally established.

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(1) L. R. 3 Eq. 1, 25.

It therefore appears that it is impracticable at the present time to carry the trusts relating to the endowment funds in this country allocated to the Bishopric of Cape Town into execution; and the question arises whether the Court can or ought to direct a cy-près application. It was argued that the Court has no jurisdiction to give any such direction, because the trusts relate to a charity the objects of which are resident abroad. I am unable to find any warrant for the suggestion that there is no jurisdiction to deal with the matter. The fund with which the Court is asked to deal is in this country; its trustees are here and the trusts relating to it were established here. As Maugham J. pointed out in *In re Robinson* (2), after citing *In re Vagliano* (3), no difficulty arises in a case where the trustee is in this country in providing or supplying the details of the trust, even though the chief objects of the charity are resident abroad. It is true that he suggests that there may be a distinction in a case where it is necessary to apply the fund cy-près and a case where a scheme is required to supply the details of the trust; but so far as I am aware or can ascertain—and counsel have not called my attention to any decision on the point—no difference has ever been established to exist on this ground. Personally I am unable to appreciate why the jurisdiction should exist in the one case and not in the other; the same considerations seem to me to apply to each case. This is the view submitted to me on behalf of His Majesty's Attorney-General and is the one which I propose to adopt.

It is quite true that the Court has power in a case where the objects of the charity are resident abroad to direct proper persons to apply to the appropriate foreign Court for the settlement of a scheme—an example of such a case is to be found in *Forbes* v. *Forbes* (4)—but in the present case there are in truth no local requirements calling for consideration.

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(1) 3 Moo. P. C. (N. S.) 115.

(2) [1931] 2 Ch. 122.

(3) [1905] W. N. 179.

(4) 18 Beav. 552.

All that is required is the identification of the person to whom the income is to be paid.

I therefore propose to make an order by way of scheme for the application of the income of the funds in this country cy-près.

What is the proper method of application? As I have already pointed out, there is no person fulfilling the exact requirements of the trusts; but there is an Archbishop of Cape Town. He is a Bishop of the Church of the Province of South Africa. That Church is within the Anglican communion; and although it is not in connection with the Church of England, there can be no doubt but that it is a Church in communion with the Church of England, and that such may be the case is recognized by statute: see the Indian Church Act, 1927 (17 & 18 Geo. 5, c. 40, s. 4). Its Bishops are summoned to the Lambeth Conference, a body which, although it has no legal basis, meets periodically at Lambeth under the presidency of the Archbishop of Canterbury for the purpose of co-ordinating the work of the various Churches of the Anglican Communion: see Halsbury's Laws of England, 2nd ed., vol. 11, p. 574. The Diocese of Cape Town is still part of the same area as that provided for by the Letters Patent of 1847. The Archbishop of Cape Town exercises (apart from ecclesiastical jurisdiction) the like episcopal supervision and ministry over and in respect of that Diocese as is exercised by a Bishop of the Church of England over an English Diocese, and he includes in his ministrations all members of the Church of England willing to receive the same. The Church of the Province of South Africa is in full communion with the Church of England; it recognizes its orders and accepts ordinations made by its Bishops under the Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77, s. 8), and admits to the full privilege of communicant membership any of its lay members. The only difference in its constitution is (as held in *Merriman* v. *Williams* (1)) that it is not bound by decisions in questions of faith and doctrine or in questions of discipline relating to faith and doctrine other than those of its own ecclesiastical tribunals or the tribunal of appeal.

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(1) 7 App. Cas. 484.

So far as the evidence goes, there is no suggestion that any decision by its own tribunals on any of such questions exists to distinguish it in fact from the Church of England or which causes any divergence from it in any matter of faith or doctrine.

In view of all these facts and circumstances and having regard to the fact that there is no present likelihood of any other Bishop being appointed either by the Crown or the Imperial Parliament to minister within the existing Diocese of Cape Town to the needs of the particular Churches which have refused to join the Church of the Province of South Africa, I have no doubt that the proper cy-près application of the income in question is to direct the trustees here to pay it until further order to the Archbishop of Cape Town for the time being appointed and recognized by the Church of the Province of South Africa.

No case is made for any division of payment or anything of that kind. The object with which the fund was established was the endowment of a Bishopric. In almost all essential particulars the Archbishop of Cape Town of the Church of the Province of South Africa fulfils the requirements of the trust, and it is difficult to imagine any person who in the existing circumstances more nearly answers to the requirements of the trust.

I think the proper order will be, first, to declare that on the true construction of the resolutions, the original trusts which affect the property in question were for the endowment of a Bishopric of Cape Town in connection with the Church of England; then to recite that the original trusts have become impracticable, and to order by way of scheme cy-près that such parts of the property of the Colonial Bishoprics fund as have been allocated to the endowment of the Bishopric of Cape Town, now in the hands of the trustees of the fund, shall be until further order held upon trust to pay the income thereof to the Archbishop of Cape Town for the time being of the Church of the Province of South Africa so long as such Church remains in communion with the Church of England.

Upon it being brought to his Lordship's notice in Court that the question whether the Church of the Province of South Africa might not at some future date cease to be in communion with the Church of England and the necessity for some evidence to show whether the Church was in communion, his Lordship, subject to the consent in writing of the Archbishop of Canterbury being obtained, made the declaration—following the analogy of s. 4 of the Indian Church Act, 1927—that the income of the fund should be paid to the Archbishop of Cape Town for the time being of the Church of the Province of South Africa unless and until the Archbishop of Canterbury should certify in writing under his hand to the Attorney-General that the said Church had ceased to be in communion with the Church of England.

Following a further application to his lordship in Court, the material portions of his lordship's Order as finally drawn up were as follows :—

THIS COURT DOTH DECLARE that the trusts of the property hereinafter referred to were for the endowment of a Bishopric in Cape Town in connection with the Church of England as by law established AND it appearing that the original trusts of the property have become impracticable THIS COURT DOTH ORDER by way of scheme cy-près that such parts of the property of the Colonial Bishoprics' Fund as have been allocated to the endowment of the Bishopric of Cape Town and are now or may hereafter be in the hands or under the control of the trustees of the Colonial Bishoprics' Fund be held by them until further order Upon trust to pay the income thereof to the Archbishop of Cape Town for the time being of the Church of the Province of South Africa unless and until the Archbishop of Canterbury for the time being shall certify by writing under his hand sent to His Majesty's Attorney-General that the said Church has ceased to be in communion with the Church of England.

Solicitors : *Lee, Bolton & Lee ; Wainwright & Co. ; Treasury Solicitor.*

A. R. T.

SNOWDON *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND.

LUXMOORE J.

1934 Oct. 25.

[1933. S. 3897.]

Vendor and Purchaser—Reservation of Minerals—Covenant to pay Compensation for Damage caused by underground working—Covenant running with the land—Assignment of Covenant—Damage accruing before Sale—Whether right to Compensation passes to subsequent Purchaser.

H. S., a yearly tenant of a certain farm, subsequently purchased the fee simple of the surface of the land. The underlying minerals had been reserved to the original owners by a previous conveyance, together with the right to work the same, but there was a proviso in that conveyance granting reasonable compensation to the surface owner for damage caused to the surface by the working of the minerals. This proviso constituted a covenant between the parties running with the land. The conveyance to H. S. was subject to this reservation of the underlying minerals, and H. S. accordingly obtained the benefit of the covenant.

The minerals had been worked for some time both before and after the sale to H. S., and damage had been caused to the surface thereby.

In an action by H. S. claiming compensation for damage caused to the surface by the working of the underlying minerals both before and after the conveyance to him, it was admitted that compensation for damage caused after the date of the conveyance was recoverable by him :—

Held, that he was not entitled in the absence of an express assignment to recover under the covenant any compensation for damage which had accrued before the conveyance to him of the surface.

ACTION.

By an indenture dated December 23, 1864, a certain freehold property belonging to the Dean and Chapter of Durham (who owned the surface of the land and the minerals thereunder) known as Merrington Grange Farm in the parish of Kirk Merrington in the County of Durham was conveyed unto Sir William Eden, Bt., his heirs and assigns in fee simple. By the conveyance there was reserved unto the Dean and Chapter their successors and assigns, all and singular the mines quarries minerals and other substrata therein more particularly described whether opened or unopened within or under the said grounds and premises conveyed in reversion or possession or being part or parcel thereof, together with powers for winning working removing and carrying away the same. The indenture also contained a proviso that the Dean and Chapter their successors assigns and lessees, owner or occupiers for the time being of the reserved mines or minerals and such other person or persons as aforesaid, should pay to the said Sir William Eden his heirs and assigns reasonable compensation for the use and occupation of any part of the said ground or for the severance of the same or for the spoil of ground or damages to the buildings on or to the surface of the said leasehold and freehold ground which should be taken done or occasioned by the exercise of the powers thereby excepted and reserved, such compensation (as often as any cause for the same should have arisen) to be determined if the parties could not agree by arbitration as therein more particularly mentioned.

By an agreement in writing dated January 18, 1900, Merrington Grange Farm was let to the plaintiff H. N. Snowdon as a yearly tenant on the terms and conditions therein set out.

By a conveyance on sale dated June 2, 1921, and made between Sir Timothy C. Eden, Bt. (the successor in title of the original vendor Sir William Eden), of the first part, certain persons (therein called "the trustees") of the second part, and the plaintiff of the third part, Merrington Grange Farm, excepting the mines and minerals lying and being thereunder, together with the power for working removing and carrying away the same reserved unto the Dean and Chapter of Durham their successors and assigns by the above mentioned conveyance of December 23, 1864, was conveyed unto the plaintiff in fee simple.

The defendants were the successors in title of the Dean and Chapter of Durham, and for upwards of fifty years and at the date of the action were the estate owners in fee simple of the mines and minerals and powers thereby reserved to the said Dean and Chapter by the above mentioned conveyance of December 23, 1864.

The plaintiff alleged that at the time when he became tenant of Merrington Farm and subsequently purchased the freehold, considerable injury had been caused to the surface by the working of the minerals thereunder by the exercise of the powers reserved by the conveyance of December 23, 1864, and that further injury had also been caused to the farm by the working of the minerals after he had purchased the freehold on June 2, 1921.

He therefore sought a declaration that he was entitled to recover compensation from the defendants for injury to the farm which had resulted from the working of the minerals before as well as after June 2, 1921, the date of the conveyance of the freehold to him.

The defendants, while admitting that any damage resulting to the land after the conveyance of the freehold to him would be recoverable by the plaintiff, denied that he was entitled to compensation for injuries to the land occurring before that date.

J. M. Gover K.C. and *L. W. Byrne* for the plaintiff. It is submitted that the plaintiff is entitled to recover compensation for injury to the surface sustained both before and after the conveyance of June 2, 1921. The proviso in the conveyance of 1864 as to the payment of compensation operates as a covenant by the grantors: Norton on Deeds, 2nd ed., p. 534.

The covenant runs with the land: *Dyson* v. *Forster* (1), for Lord Macnaghten's remarks. If so, when the plaintiff got the freehold of the land in 1921, a benefit ran in his favour and any breach of this was in the nature of a continuing breach.

F. K. Archer K.C. and *W. F. Waite* for the defendants. The question is, Where a surface lessee purchases his surface reversion, does he get any rights of action vested in his lessor? Here it is not simply the case of a lessor and a lessee. The use of the words "continuing breach" is a misapprehension; the assignee cannot sue for breaches of covenant incurred before the assignment to him: see Woodfall on Landlord and

(1) [1909] A. C. 98, 102.

Tenant, 23rd ed., pp. 313, 328; *Lewes* v. *Ridge* (1), *Johnson* v. *Churchwardens of St. Peter, Hereford.* (2) The plaintiff could only get damages if he sued the defendants as trespassers: see *Westhoughton Urban District Council* v. *Wigan Coal and Iron Co.* (3) The defendants here cannot be held liable. The plaintiff has bought land, damaged land, he should therefore have stipulated for damages.

It is submitted that if the surface lessee purchaser brings an action against the mining lessee, he cannot recover anything on his writ because there is no privity of contract. Again, if he sues the surface vendor owner, the result is also that he cannot succeed because the sale contract does not assist, and further if he sues the mine owner, the result is equally the same, because he has no privity of contract with the mine owner and the surface lessee purchaser is not the surface owner in whom the right to sue vested either originally or by assignment. Here the deed did not assign the pre-existing cause of action: *Wedd* v. *Porter.* (4)

There is no case where this point has arisen between a vendor and purchaser.

Further the right to damages cannot be assigned: *Defries* v. *Milne.* (5) If there is no direct privity of contract, the action can only be for trespass. Further there can be no assignment of this kind of right of action in equity.

J. M. Gover K.C. in reply. In cases as regards leases, there is no doubt that if there is a true continuing covenant, the assignee can sue. [He referred to *Powell* v. *Hemsley* (6); *Dawson* v. *Great Northern and City Ry. Co.* (7)]

It is submitted (1.) that this is a case of a continuing breach and (2.) the right to compensation is a privilege or right within the Conveyancing and Law of Property Act, 1881, s. 6, sub-s. 1 (now s. 62 of the Law of Property Act, 1925).

LUXMOORE J. The short question to be determined is this: Is a grantee of land entitled to recover under a covenant by a third party with the grantor, compensation for damages caused by working minerals where the right to such compensation accrued before the date of the conveyance to the grantee? There is no dispute on the facts material to the decision of this point, which is really a preliminary point of law to be determined between the parties.

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(1) (1601) Cro. Eliz. 863.
(2) (1836) 4 A. & E. 520.
(3) [1919] 1 Ch. 159.
(4) [1916] 2 K. B. 91, 102.
(5) [1913] 1 Ch. 98.
(6) [1909] 2 Ch. 252, 256, 258.
(7) [1905] 1 K. B. 260.

The facts are: The Dean and Chapter of Durham owned a farm called Merrington Grange Farm at Kirk Merrington, Durham. They were the owners of the surface and the minerals. On December 23, 1864, they conveyed to Sir William Eden the farm, reserving to themselves, their successors and assigns, the mines and minerals and the right to work those mines and minerals, and the conveyance contained a proviso that the Dean and Chapter, their successors, assigns and lessees should pay to Sir William Eden, his heirs and assigns, reasonable compensation for the use and occupation of any part of the ground or for the severance of the same or for the spoil of ground or—and this is the important part—"damages to the buildings on or to the surface of the said leasehold and freehold ground which should be taken done or occasioned by the exercise of the powers hereby excepted and reserved." The conveyance contained provisions for the ascertainment of the compensation.

There is no doubt but that that proviso constitutes a covenant between the parties which runs with the land, having regard to the form of the proviso and the persons mentioned in it.

On June 2, 1921, the successor in title of Sir William Eden conveyed the farm in question, subject to the exceptions and reservation to which I have referred, to Mr. Snowdon, the plaintiff in this action; and as a result of this conveyance, Mr. Snowdon undoubtedly obtained the benefit of the covenants which ran with the land. My attention has been called to the fact that for some years previous to the purchase, Mr. Snowdon was lessee of the property, but this seems to be immaterial to the point which I have to determine. Mr. Snowdon has brought this action to have the point determined whether he is entitled to recover damages in respect of injuries which have resulted, or which may have resulted, from the working of the underlying minerals before as well as after the date of the conveyance, that is June 2, 1921. The defendants admit that any damage resulting to the land by reason of working after June 2, 1921, is recoverable by the plaintiff; but they challenge his right to damages in respect of injuries which had occurred before that date.

It is plain that the benefit of the covenant to pay compensation for damage runs with the land. But this does not decide the question. The damages which accrued before the conveyance to the plaintiff were something which the then owner was entitled to recover. Without express assignment of those damages to the plaintiff, it is difficult to see how he could have any claim to them. The question whether such an assignment would be good or bad does not arise in the present case and I say nothing about it at the moment. It is difficult to see on what principle damages which have accrued before the date when the benefit of the covenant was assigned passed by a simple assignment of the covenant itself. There is no difference in principle in the position of the parties in such a case and that of the grantor and grantee of the reversion of property subject to a lease with regard to the lessee's covenants.

It has been settled long ago that the grantee of a reversion has no right of action against the lessee, whether for arrears of rent due at the date of the grant or for breaches of covenant (although those covenants run with the land), committed before that date. If authority is required for this proposition it is to be found in the well known cases of *Lewes* v. *Ridge* (1) and *Johnson* v. *Churchwardens of St. Peter, Hereford.* (2) The authority of these cases has been frequently recognized. They are referred to by Swinfen Eady L.J. in his judgment in the case of *Wedd* v. *Porter* (3), where he states that for any breaches which occurred before conveyance the grantee cannot sue, as causes of action which had accrued to the grantors do not pass to the grantee by conveyance.

(1) Cro. Eliz. 863.

(2) 4 A. & E. 520.

(3) [1916] 2 K. B. 91, 102.

Mr. Gover has suggested that this right passes in some way without any assignment, as being within the general words to be found in the Conveyancing and Law of Property Act, 1881, s. 6, sub-s. 1. The words of that section, so far as they are material to his argument, are: "A conveyance of land . . . . shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof." I think that the words need only be read to find that the answer is in the negative. He further argued that this covenant is in the nature of a continuing covenant, and that therefore the right to enforce it passes to the plaintiff. If the right to damages or compensation is in the nature of a continuing right, the plaintiff's ability to enforce it arises not in respect of anything which happened before the conveyance of the property to him, but by reason of the fact that the right being a continuing right arose after the property became his. I am unable to see any ground on which it can be said that the right to recover damages or compensation which accrued before the property was conveyed to Mr. Snowdon has passed to him. In my judgment the action fails and must be dismissed with costs.

Solicitors: *Tarry, Sherlock & King, for Trotter, Bruce & Loft, Bishop Auckland; Milles, Jennings White & Foster.*

A. R. T.

LUXMOORE J.

1934
Nov. 6.

PEARCE *v.* MARYON-WILSON.

[1933. P. 2826.]

Landlord and Tenant — Building Scheme — Restrictive Covenants — Lessees not to use premises demised except as private dwelling-houses without consent of Lessor—Exercise of Lessor's powers to depart from scheme — Rights of neighbouring Lessees — Depreciation of Property—Release of restrictions by Lessor.

The plaintiff was the lessee for a term of years of a house built on a plot of land which formed part of an estate laid out (as the Court assumed for the purpose of the decision) as a building estate under a scheme. One of the lessee's covenants was not to convert use or occupy the premises into or for certain purposes or use the same otherwise than as a private dwelling-house without the consent in writing of the lessor having been first obtained.

The defendant as the successor in title to the original lessor was the owner of the alleged building estate, including the house leased to the plaintiff, and of divers other houses held by lessees subject to covenants identical with those in the plaintiff's lease.

The plaintiff alleged that under an implied condition in the general building scheme the defendant was not entitled to permit any relaxation of or to remit any of the covenants in respect of the several parts of the estate so as substantially to depreciate the value of the other parts of the estate; and he claimed an injunction to restrain the defendant from permitting any lessee or purchaser to use any part of the estate otherwise than in accordance with the scheme:—

Held, that the words "Without the consent in writing of the said lessor having been first obtained," must be read in their natural sense as conferring on the lessor the widest possible power of giving or withholding his consent. The lessor was therefore entitled to authorize whatever user of the property he desired without regard to anything but his own wishes. The plaintiff's action consequently failed.

ACTION.

By an indenture dated March 20, 1899, and made between Sir Charles Pocklington Maryon Maryon-Wilson, Bt. (therein for himself his heirs sequels in estate and assigns called "the lessor"), of the one part and the plaintiff (therein called "the lessee") of the other part, the lessor granted and demised unto the lessee a certain piece or parcel of land together with the messuage or dwelling-house erected thereon situate

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in Aberdare Gardens Hampstead in the County of London for the term of 99 years from December 25 1895 at the yearly rent therein mentioned and subject to divers covenants. One of the lessee's covenants was as follows: clause 14 "And also that the said lessee will not convert use or occupy the said premises or any part thereof into or for any school hospital or sanatorium . . . . or for any shop warehouse or other place for carrying on any trade business or manufacture whatsoever . . . . or use the same otherwise than as a private dwelling-house without the consent in writing of the said lessor having been first obtained. . . . ."

The lessor was the owner of a freehold building estate at Hampstead which included land in Aberdare Gardens and a large number of other houses thereon as well as the plaintiff's house, and which had been let on leases to various lessees and contained covenants similar to those in the plaintiff's lease.

The plaintiff alleged that the property in question demised by the lessor and other property adjoining was the subject of a building scheme; this was denied by the defendant, the successor in title of the original lessor. He also stated that it was an implied term and condition of the building scheme and in respect of each of the leases of the dwelling-houses demised by the lessor that the defendant would not permit any purchaser or lessee deriving title from him or his predecessors in title of any of the plots of land in Aberdare Gardens upon the building estate to use any building erected thereon otherwise than as a separate private dwelling-house or so as to effect any departure from the character of the dwelling-houses so erected.

The plaintiff further alleged that in breach of this implied term, the defendant had permitted purchasers and lessees, deriving their title from him or his predecessors in title of the land in question, to use the premises erected thereon otherwise than as separate private dwelling-houses, and had thereby effected a departure from the character of the said dwelling-houses so erected and from the said building scheme and that in consequence he had thereby suffered damage.

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The plaintiff therefore claimed an injunction to restrain the defendant from permitting any purchaser or lessee deriving title from him or his predecessors in title of any plot of land in Aberdare Gardens, Hampstead, to use any premises erected thereon otherwise than as separate private dwelling-houses or so as to effect any departure from the character of the dwelling-houses so erected.

The defendant alleged in his defence that he was entitled to authorize a departure by any of the tenants of his property from the terms of his lease.

Gavin Simonds K.C. and *R. Fortune* for the plaintiff. The real question here, it is submitted, is whether a lessor—where there is a building scheme—is entitled to relax or remit covenants in respect of several parts of the land comprised in the building scheme so as substantially to depreciate the value of other parts of the land comprised in the scheme. For a case where there was a general scheme regarding a building, see *Hudson* v. *Cripps*. (1) There is no authority very much in point, but compare *Whitehouse* v. *Hugh*. (2)

Here, however, there is a common building scheme for this estate for the benefit of all the lessees, and a condition is attached that the defendant should not himself alter the character of the property leased by his predecessors in title so as substantially to destroy its value or cause damage or annoyance to other lessees of houses on the estate.

H. B. Vaisey K.C. and *H. O. Danckwerts* for the defendant were not called on.

LUXMOORE J. The answer to the main question arising in this case depends on the true construction of a limitation in a particular covenant contained in a series of leases. For the purpose of determining this question, and for this purpose only, I shall assume as facts matters which are in dispute between the parties, in particular that there was a building scheme which affected the property of Sir Spencer P. M. Maryon-Wilson in Hampstead. Whether that building scheme

(1) [1896] 1 Ch. 265.

(2) [1906] 2 Ch. 283.

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is in respect of the whole of that property or only of a particular part of it does not matter. I shall also assume that the covenants which have been entered into with regard to the property comprised in that estate are binding on the various persons who are lessees of the estate; that the release of those covenants to a substantial extent would injuriously affect the plaintiff and other persons holding leases of property on the estate; and that all the leases are in the same form, or substantially in the same form, as the lease of March 20, 1899, entered into between Sir Charles Pocklington Maryon Maryon-Wilson of the one part, and Mr. Simon Henry Pearce, the plaintiff in this action, of the other part. The lease is for the term of 99 years from December 25, 1895, at a ground rent of 16*l.* per annum, and it contains a number of covenants. The material covenant (clause 14) is in these words: " The said lessee will not convert use or occupy the said premises or any part thereof into or for any school hospital or sanatorium or for the reception of lunatics or persons of unsound mind or for any shop warehouse or other place for carrying on any trade business or manufacture whatsoever or keep fowls pigeons or poultry upon any part of the said premises or let furnished or unfurnished apartments or hang out or expose any linen which may have been washed or otherwise to dry in the front or back gardens or use the same otherwise than as a private dwelling-house"—then follow these material words, which I think are a limitation on the whole of the covenant—" without the consent in writing of the said lessor having been first obtained."

The question which I have to determine is this: Is the power which is reserved by the lessor to release those restrictions a power which he can exercise arbitrarily? I do not use that word in any offensive sense—but can he do it according to his own pleasure and without regard to the rights of any other person interested in this estate?

Mr. Gavin Simonds, on behalf of the plaintiff, says that having regard to the fact that there is a building scheme there must be some restriction put on the generality of these words. He says that the equity of the case requires that the consent

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can only be given in respect of matters which do not create a radical alteration of the scheme, and that as between a lessor and a lessee there is no need for any dispensing power at all. It is quite true that in the case of a single lessor and a lessee, there is no need for the words, " without the consent in writing of the said lessor having been first obtained," because of course the lessor can agree with his lessee to vary the terms in any way they both desire. But I think that the very fact that there is a building scheme in existence requires that these words should be present in each of the leases if the lessor is to have power to authorize any departure from the building scheme. The words make it quite clear that the lessor is to have the widest possible power. He is given an absolute power of consenting or withholding his consent, and there is no authority to which I have been referred, or which the industry of counsel has been able to discover, which suggests that these words should, in a lease of this kind, be construed in anything but their ordinary and prima facie meaning.

That being so I am satisfied, on the assumption which I have made, that the lessor is entitled to give or withhold his consent to the various modes of user of the property which are referred to in clause 14 of the lease without regard to anything but his own wishes. It seems to me that even if Mr. Gavin Simonds established the existence of a building scheme and injury to his clients by any departure from it, he would still in law have no cause of action against the present lessor. In those circumstances no useful purpose could be served by proceeding further with the case, and the only thing that I can do is to dismiss the action and dismiss it with costs.

Solicitors: *Ellis, Bickersteth & Co.; May, May & Deacon.*

A. R. T.

In re ELLIS.

NETTLETON *v.* CRIMMINS.

[1934. E. 374.]

FARWELL J.
1934
Oct. 4.

Will—Pecuniary Legacies—Funds to be set aside to provide incomes for named persons for life—Capital to fall into Residue—Deficiency of Estate—Administration—Legatees treated as Annuitants—Rate of Interest for purpose of calculating value of Annuities—Date from which Annuities to be calculated—Date of Order—Death of Annuitant before date of Order.

A testator by his will bequeathed various pecuniary legacies, and he directed that a fund, the market value of which at the time of appropriation should amount to 40,000*l.*, should be held on trust to pay the income thereof to certain named persons and in the proportions therein directed for their respective lives, and he further directed that a sum of 5000*l.* should be so set aside and the income thereof paid to L. da C. B.-L. for his life and after his death to his wife, L. G. B.-L., during the remainder of her life, subject to a restraint on anticipation during coverture, and that on the determination of the life or other interests in any part or parts of those funds, such part or parts should fall into and form part of his residuary estate. The estate of the testator proved insufficient to meet the pecuniary legacies and to provide for the two funds:—

Held, that the legatees entitled to life interests in the two funds ought to be treated as annuitants.

In re Richardson [1915] 1 Ch. 353 followed.

The testator declared that the two funds should carry interest at the rate of 5 per cent. from the date of his death until the date of appropriation.

Held, that the annuities should be calculated as from the date of the order, and that 4 per cent. should be allowed for the purpose of calculating the value of the respective annuities.

A legatee, entitled to a share in the 40,000*l.* fund, who survived the testator two years, died before the date of the order.

Held, that the estate of the deceased legatee was entitled to 5 per cent. on the capital value of his interest under the will up to the date of his death, and no more.

Held that, with regard to the 5000*l.* fund, the husband and wife must be treated as being entitled to two separate annuities, the husband to an annuity during his life and the wife to a reversionary annuity expectant upon his death and contingent upon her surviving him.

ADJOURNED SUMMONS.

By his will, dated October 28, 1930, the testator appointed the plaintiff and the defendant Oswald Harry Ellis to be his executors and trustees. After giving a specific legacy to his executors he bequeathed several legacies. By clause 8 the testator directed his trustees to set apart out of his estate: (1.) a fund (hereinafter called "the Ellis Fund"), the market value of which at the time of appropriation should amount to 40,000*l.*, to be held upon trust, (*a*) to pay the income of 9/40ths to his brother, the defendant Arnold Robertson Ellis, during his life; (*b*) to pay the income of 9/40ths to his brother, the defendant O. H. Ellis, during his life; (*c*) to pay the income of 9/40ths to his brother, the defendant Theodore Carlyle Ellis, during his life; and (*d*) to pay the income of the remaining 13/40ths to his brother Harold Spenser Ellis during his life; (2.) a fund (hereinafter called "the Brawne-Lindon Fund"), the market value of which at the time of appropriation should amount to 5000*l.*, to be held upon trust to pay the income to the defendant Louis da Cunha Brawne-Lindon during his life and after his death to his wife, the defendant Lucy Georgina Brawne-Lindon, during the remainder of her life without power of anticipation during coverture. The testator directed that on the determination of the life and other interests given in any part or parts of the Ellis Fund and the Brawne-Lindon Fund such part or parts should fall into and form part of his residuary estate, and he declared that until the Ellis Fund and the Brawne-Lindon Fund should be set apart, "the same shall respectively carry interest at the rate of 5*l.* per centum per annum as from my death which interest shall be paid out of my estate or the income thereof and shall be applicable as income of the Ellis Fund and the Brawne-Lindon Fund respectively."

The testator further declared that his trustees should not require payment of any of the moneys advanced by him to any of his brothers, but that the amount of any moneys advanced by him since October 1, 1928, and outstanding at his death should be deducted from the capital of the share in the Ellis Fund in which such brother had a life interest. By clause 9 the testator gave directions as to the disposal of his residuary estate.

The testator died on August 24, 1932. His brother,

H. S. Ellis, died on January 5, 1934, having by his will appointed the defendant Laura May Ellis his executrix. At the date of the testator's death there was owing to him by H. S. Ellis the sum of 5385*l.* 13*s.* 11*d.* in respect of advances made since October 1, 1928. Allowing for that sum the total value of the testator's estate, after payment of estate duty and interest, amounted to the sum of 40,459*l.* 0*s.* 4*d.*, out of which the legacies and duty thereon and the Ellis Fund and the Brawne-Lindon Fund had to be provided. The testator's debts and funeral and testamentary expenses having been paid by the executors, they proceeded to make an interim distribution of the estate, paying three-fifths of the legacies and the legacy duties thereon and on the specific legacy and appropriating investments to meet three-fifths of the Ellis and the Brawne-Lindon Funds.

Questions having arisen how the estate ought to be dealt with, this summons was taken out by the plaintiff raising the questions whether: (1.) The income of the respective shares of the surviving tenants for life of the Ellis Fund ought to be treated as annuities and valued on that basis; (2.) The income of the Brawne-Lindon Fund ought to be treated as an annuity during the joint lives of the defendants L. da Cunha Brawne-Lindon and L. G. Brawne-Lindon and the life of the survivor of them and valued on that basis, and if the answer should be in the affirmative, what was the rate of interest to be allowed for the purpose of calculating the amounts of the respective annuities and as from what date. Further, if the answer to (1.) and (2.) should be in the affirmative, whether: (*a*) The annuities so ascertained ought to be valued as at the date of the death of the testator or at some other and what date or in some other and what method; (*b*) The amount of the valuations ought to be treated as pecuniary legacies; and (*c*) The pecuniary legatees and the legacy duty on the pecuniary and specific legacies ought to be paid in full and A. R. Ellis, O. H. Ellis and T. C. Ellis paid the amounts of the valuation of their respective annuities and L. M. Ellis, as executrix of H. S. Ellis, ought to be paid the amount of the valuation of his annuity, and the amount

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of the valuation of the annuity for the joint lives of L. da Cunha Brawne-Lindon and L. G. Brawne-Lindon and the life of the survivor ought to be invested in the purchase of a Government annuity and paid to L. da Cunha Brawne-Lindon during his life and after his death to L. G. Brawne-Lindon, if surviving him, during her life or the amount of the valuation paid to them on their joint receipt.

P. M. Walters for plaintiff.

A. Guest Mathews for pecuniary legatees. The existing life interests in the Ellis Fund and the Brawne-Lindon Fund ought to be valued as annuities for life: *In re Richardson.* (1) The valuation ought to be made as at the date of the order to be made on this summons: *In re Dempster.* (2) Harold Ellis having died before any order was made was merely in the position of a tenant for life whose interest has determined by death and his personal representative cannot claim the capital value of the annuity. The rate of interest allowed by the Court varies from time to time. It was raised from 3 per cent. to 4 per cent. in 1919: *In re Beech.* (3) At that time good trustee investments were yielding 5 per cent. The rate to be allowed by the Court ought, upon that principle, to be 3 per cent. at the present time.

Greenland for the residuary legatees. The infant residuary legatees are given life interests in residue contingently on attaining the age of twenty-five years. The rule of practice in administrations by the Court that in a case where the testator's estate is insufficient to pay in full pecuniary legacies and annuities which rank pari passu the annuities must be valued and the ascertained values treated as pecuniary legacies has been extended to the case of a life interest in a settled legacy, if the capital of the legacy is directed to fall into residue on the death of the life tenant: *In re Richardson.* (1) If this rule is adopted in the present case there will be income of residue immediately available for the infants' maintenance. The life interest should be valued on a 4 per cent. basis as at

(1) [1915] 1 Ch. 353. (2) [1915] 1 Ch. 795.
(3) [1920] 1 Ch. 40.

the date of the order, and from the testator's death up to that date the life tenants of these settled legacies are entitled under the direction in the testator's will to interest at the rate of 5 per cent. on the aliquot shares of these legacies less any sum already paid to them. The appropriation referred to in the testator's will was meant to be a complete appropriation, and the partial appropriation purported to be made by the trustees must, in the circumstances, be ignored. In applying the rule regard must be had to the events which have happened: *Todd* v. *Bielby* (1); *Potts* v. *Smith* (2); and *In re Ross.* (3) In the present case Harold Ellis died before any order was made. The successive life interests of L. da Cunha Brawne-Lindon and L. G. Brawne-Lindon should be valued as separate annuities, the life interest of the latter being valued as a reversionary annuity contingent on her surviving her husband.

C. R. R. Romer for the legal personal representative of Harold Ellis. The income of the respective shares ought to be treated as annuities and valued on that basis: *In re Richardson.* (4) On this footing Harold Ellis became entitled to an annuity equivalent to 5 per cent. on 13,000*l.*, less the amount owing by him. By reason of the insufficiency of assets his estate is therefore entitled to the capitalized value of the annuity with 4 per cent. interest thereon from the testator's death, less the amount actually received. The fact that the annuitant is now dead makes no difference: *In re Ross* (3); *Long* v. *Hughes.* (5) Beneficial rights cannot be adversely affected by the fact that the executors administered on a wrong principle. If the proper principle had been adopted, Harold Ellis, who survived the executors' year, would have been entitled to the capitalized value of his annuity and his executrix is entitled to it now in his place.

G. R. Upjohn, B. S. Tatham, Watmough and *Hon. C. R. Russell* for other defendants.

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(1) (1859) 27 Beav. 353.
(2) (1869) L. R. 8 Eq. 683.
(3) [1900] 1 Ch. 162.
(4) [1915] 1 Ch. 353.
(5) (1831) 1 De G. & Sm. 364.

FARWELL J.
1934
ELLIS, *In re.*
NETTLETON *v.* CRIMMINS.

FARWELL J. This summons is taken out for the purpose of determining certain questions which have arisen in the administration of the estate of the testator.

There is no question of the construction of the will. The difficulty which has arisen is due to the fact that the estate is insufficient to provide in full the pecuniary legacies and the legacy duty thereon and certain specific sums which are directed to be set aside and invested and the income therefrom paid to certain named persons.

The main question which I have to consider is whether this is a case in which I ought to follow the decision of Eve J. in *In re Richardson.* (1) In that case the testator " gave the residue of his property upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legatees to fall into the ultimate residue, the other four sums being settled. The estate was insufficient to provide the eight sums." Eve J. held that " on the authority of *Arnold* v. *Arnold* (2) the four legatees, the capital of whose legacies was at their respective deaths to fall into residue, ought to be treated as annuitants." So treating them, he applied the rule in *In re Cottrell.* (3) That decision was I think an extension of the earlier authorities, and it may be that the effect of it is to defeat to some extent the intention of the testator, but none the less it is a decision which I ought to follow if it is applicable in the present case. It has not been seriously argued that *In re Richardson* (1) does not apply, and in my judgment it is not possible to distinguish this case from it. We have here persons who are entitled to the income of moneys to be set aside, those moneys ultimately on the death of the various life tenants falling into residue, and that is precisely the position with which Eve J. had to deal in *In re Richardson.* (1) Under those circumstances it appears to me that I must follow that decision, with the result that for the purpose of administering this estate the four brothers of the testator who are entitled during their lives to the income of the 40,000*l.* fund and the gentleman and his wife who are entitled to the income of the 5000*l.* fund must be treated as annuitants.

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(1) [1915] 1 Ch. 353.
(2) (1835) 2 My. & K. 365, 374.
(3) [1910] 1 Ch. 402.

That, however, does not dispose of the various questions which arise in this case. In the first place, since *In re Richardson* (1) is to be applied and these persons are to be treated as annuitants, they are entitled according to the well-established rule to have their annuities valued and to have paid out to them the capital value thereof except in the case of the married lady, Mrs. Brawne-Lindon. In her case it is impossible to pay to her during her husband's life the capital value of her annuity, because by the terms of the will she is restrained from anticipation. In dealing with the Brawne-Lindon Fund it appears to me the executors must treat the husband and wife as being entitled to two separate annuities, the husband to an annuity during his life, and the wife to a reversionary annuity expectant upon his death and contingent upon her surviving him. They must be valued separately in that way, and the capital value of the contingent reversionary interest of Mrs. Brawne-Lindon must be retained during the joint lives of the spouses, and the interest thereon paid to her subject to the restraint on anticipation.

The next question to be determined is what is the rate of interest to be allowed for the purpose of calculating the value of the respective annuities. The will provides that the annuitants, or rather the persons who are deemed to be in the position of annuitants, are to receive 5 per cent. per annum on the sums directed to be set aside from the testator's death until appropriation ; and it has been argued that that indicates that the testator intended, if there was an insufficiency and if *In re Richardson* (1) was applicable, that 5 per cent. was to be the rate of interest for the purposes of valuation. I am wholly unable to follow that. I cannot conceive that the testator ever considered the possibility of an insufficiency of his estate or that he had *In re Richardson* (1) in mind when he gave directions for his will. The mere fact that he desired his brothers and the other two persons to receive 5 per cent. on the capital value of the benefits given to them until appropriation cannot in any way regulate the rate of interest which the Court directs to be taken for the purpose of making the necessary valuations. It has been suggested by Mr. Guest Mathews that the rate of interest should be less than 4 per cent. The general rule at the present time is that 4 per cent. is the rate which is taken, but Mr. Guest Mathews has invited me to say that, having regard to the monetary position at the present day, that rate is too high, and it should be some lower rate. What exactly is meant by " the monetary position," I am not very sure. It was suggested, I think, that I might take judicial notice of the fact that a trustee cannot get 4 per cent. nowadays on trustee securities. I do not think that is a matter of which I can take judicial notice. It is a matter for evidence, and without such evidence I should not be justified in departing from what I think is the general rule.

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(1) [1915] 1 Ch. 353.

Then arises a more difficult question, and that is as to the date from which the annuities are to be calculated. I think in this regard the direction of the testator with regard to the 5 per cent. interest is material. It is plain from the terms of the will that the testator contemplated that there would be an interval of time between the date of his death and the date of the actual appropriation of the funds which would produce the income for these persons ; and he made provision for that by providing that each of the persons were to receive 5 per cent. per annum on the capital value until appropriation. There has been something in the nature of a partial appropriation, but that was not, in my judgment, such an appropriation as the testator had in mind, and in this case the annuities must be calculated as from to-day, that is, from the date of this order, and that up to that date the annuitants are entitled to be paid 5 per cent. on the capital value of the sums directed to be set aside. As against that must be set off any sums that they have actually been paid, and it will be a matter of calculation to arrive at the amount to which each annuitant will be entitled ; but I am satisfied that the right date to take for the purpose of calculating the capital value of these annuities is the date of the order. I find some justification for taking that view in the case of *In re Dempster* (1) before Sargant J., because in that case at the end of his judgment the learned judge says (2): "In each case the amount of the annuity must be paid down to date, and a purchase must be made of an annuity to accrue henceforth." In this case the order which I make to-day must be treated as being a substitution for the appropriation which the testator directed to be made, and accordingly the interest at 5 per cent. will be payable up to that date, and the calculations made in that way.

That deals with the questions generally with regard to these annuities, but it leaves this remaining question as to what is the position with regard to the brother who survived the testator but died some two years after his death. Mr. Romer, who appears for his legal personal representative, has urged upon me that it was the duty of the executors to adopt the method of administration which I am adopting to-day at the end of the first year; and if they had done so, they would then have arrived at the capital value of these annuities, and the brother Harold would have been paid the capital sum accordingly, subject, of course, to proper allowance being made for the sums which he owed to the testator. It is said by Mr. Romer that the fact that the executors did not take that course cannot affect the right of the deceased brother, and he cannot now receive less than he would have been entitled to had they adopted what is said now to be the right course. On the other hand, I cannot overlook the fact that if there had not been any question of an insufficiency, and the appropriation had been made, say, a day or so after the death of the brother, what the brother would have been entitled to would have been 5 per cent. to the date of his death and nothing more; he would have nothing beyond that. I think that I ought not to apply the method adopted in *In re Richardson* (3) further than is necessary to give effect to that decision. I ought not to extend it so as to defeat what appears to me to have been the intention of the testator as contained in his will. If it be right to say that the annuities ought to be valued as from to-day, which is the view I have taken, then it seems to me it must follow that in valuing the annuities one must exclude the brother who is dead. The deceased person never became entitled to an annuity because he died prior to this order, which has the effect of substituting annuities for the benefits given by the will. I do not accept the view that the executors could have safely acted upon the footing that *In re Richardson* (1) applied and proceeded accordingly without first getting the directions of the Court. In my judgment, until this Court has made the order which I am going to make to-day, there was no right in any one to demand a valuation and payment of the capital value of the benefits given by the will. Accordingly, in my judgment, what the estate of the deceased brother is entitled to is 5 per cent. on the capital value of his interest under the will up to the date of his death, and no more, and when the various annuities come to be valued, the interest which he would otherwise have taken will be omitted.

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(1) [1915] 1 Ch. 795.
(2) Ibid. 801.
(3) [1915] 1 Ch. 353.

I understand that the effect of this order will be that there will be sufficient funds to pay the other legacies in full, and that there will be some residue. If that be so the result is not an unsatisfactory one ; I shall on the whole be giving effect to the intention of the testator, disturbing it as little as possible having regard to the decision in *In re Richardson* (1), and it should now be possible to proceed with the administration of the estate in the way which I have indicated without any real difficulty.

Solicitors : *Murray, Hutchins & Co. ; Tamplin, Joseph & Co., for Higman & Hubbard, St. Austell ; Scott, Bell & Co. ; Charles Russell & Co., for Smallpeice & Merriman, Guildford.*

(1) [1915] 1 Ch. 353.

P. J. B.

LONDON AND NORTH EASTERN RAILWAY COMPANY *v.* HARDWICK COLLIERY COMPANY.

FARWELL J.

1934
Oct. 12, 16.

[1932. L. 514.]

Mines—Railway—Mining Company granted leases over three areas with right to let down surface—Surrender of leases by Company and grant of new leases to Company by same lessors on same terms—Acquisition by Railway Company of surface of same areas after grant of original leases but before surrender and grant of new leases—Mining Company's title not antecedent to acquisition of surface by Railway Company—Right of Railway Company to compensation for damage done by Mining Company to surface—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 78, 79, 85—*Mines (Working Facilities and Support) Act*, 1923 (13 & 14 *Geo.* 5, *c.* 20), *s.* 15.

In 1893, 1895 and 1897 a railway company acquired the surface of three areas. In 1889, 1873 and 1889 a mining company was granted leases of the same three areas with a right to let down the surface. In 1916 and 1920 the company surrendered their leases for the purpose of and as part of the consideration for the granting of new leases on the same terms. The owners of the land were the same in all cases. The mining company worked certain minerals under an area protected by s. 79A, sub-s. 1, of the Railways Clauses Consolidation Act, 1845, contained in s. 15 of the Mines (Working Facilities and Support) Act, 1923, and as the result of such working the railway company suffered damage:—

Held, that the mining company's right to let down the surface was not derived from a title antecedent to the acquisition by the railway company of their interest in the surface, within the meaning of s. 85B, sub-s. 2, of the Railways Clauses Consolidation Act, 1845, contained in s. 15 of the Mines (Working Facilities and Support) Act, 1923, and they were not protected by that section, and that, therefore, they were liable to contribute, under s. 79A, sub-s. 1, towards the expenses incurred in making good the damage caused by such working.

ACTION.

In 1893 the plaintiffs acquired from Lord Manvers the surface of certain land described as the "Manvers area." In 1895 they acquired from the Duke of Devonshire the surface in the "Devonshire area," and in 1897 they acquired from Major Sir Philip Hunloke the surface in the "Hunloke area."

On October 9, 1916, the defendants were granted mining leases of the Manvers area and the Devonshire area and on December 31, 1920, a mining lease of the Hunloke area. These leases were the successors of earlier leases, which were surrendered for the purpose of and as part of the consideration for the granting of the new leases. The earlier leases were dated respectively January 1, 1889, June 30, 1873, and April 5, 1889. All these leases conferred on the defendants the right to let down the surface.

The defendants had worked certain minerals under an area protected by s. 79A, sub-s. 1, of the Railways Clauses Consolidation Act, 1845, contained in s. 15 of the Mines (Working Facilities and Support) Act, 1923 (1), and as the result of such working the plaintiffs suffered certain damage and, claiming that under s. 79A, sub-s. 1, they had the right to contribution from the defendants, they called on them to contribute towards making the damage good.

The defendants, relying on s. 85B, sub-s. 2, of the Railways Clauses Consolidation Act, 1845, contained in s. 15 (2), denied that they were under any liability to contribute. The

(1) Sect. 79A, sub-s. 1: "If a mine owner works any minerals lying under any part of the area of protection in the manner authorised by this Act, he shall nevertheless become liable on demand by the company (subject as hereinafter provided) to contribute towards the expenses properly incurred, or to be incurred, by the company from time to time thereafter in making good any damage caused by such working to the railway or works of the company (not being protected works comprised in any counter-notice relating to such area of protection) the appropriate percentage (if any) of those expenses."

(2) Sect. 85B, sub-s. 2: "Nothing in this Act shall alter, diminish or affect any right to let down the surface, either unconditionally or subject to payment of compensation, or to any other condition, which a mine owner or royalty owner may possess, whether by statute grant lease agreement or otherwise, derived from a title antecedent to the acquisition by the company of their interest in the surface, or conferred on him by a reservation contained in the grant to the company, and a mine owner having such a title and having served a notice in accordance with this Act with respect to the working of any minerals, shall be free to work any such minerals, as to which a counter-notice shall not have been received, discharged from all the restrictions and provisions of this Act, other than those contained in subsection (2) of section seventy-nine of the Act, ..."

defendants gave the plaintiffs notice of their intention to work the minerals, but no counter-notice was served on them by the plaintiffs.

Gavin Simonds K.C. and *Vernon* for the plaintiffs. The right to let down the surface must be in the mine owner as against the owner of the surface, and it must be a right derived from a title antecedent to the acquisition of the surface by the railway company. The words " derived from a title " in s. 85B, sub-s. 2, must refer back to the words " right to let down the surface." Here the defendants derived their title to let down the surface under the leases of 1916 and 1920, all of which were subsequent to the acquisition of the surface by the plaintiffs. When the defendants surrendered their old leases in 1916 and 1920 they surrendered all the rights they had under them. A railway company enjoys a natural right of support for its railway : *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (1) The defendants are liable to contribute towards the expenses properly incurred or to be incurred by the plaintiffs from time to time in making good the damage caused to the railway and works of the plaintiffs by the working of minerals by the defendants.

Cleveland-Stevens K.C. and *C. R. R. Romer* for the defendants. The right to let down the surface is given to the defendants by leases derived from the titles of the lessors, which are antecedent to the acquisition of the surface by the plaintiffs. The old leases gave the defendants the right to let down the surface ; therefore the lessors must at that time have had the right to let down the surface. Alternatively the defendants claim that they were granted the right under the old leases and that the right which they have now is the continuation of one existing of which the plaintiffs must have had notice when they acquired the surface. If the old Hunloke lease had not been surrendered it would have been in existence at the date when the writ in this action was issued.

Gavin Simonds K.C. replied.

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(1) [1913] A. C. 11.

FARWELL J.

1934

L. AND N. E. RY. CO. v. HARDWICK COLLIERY CO.

FARWELL J. This action gives rise to a question of construction of one section of the Mines (Working Facilities and Support) Act, 1923. The facts are not in dispute, because the parties have been able to agree them for the purposes of this action only.

It is not necessary for me to go into the law as it was before the passing of the Act of 1923 beyond saying that, under the Railways Clauses Consolidation Act, 1845, there was a protected area of 40 yards provided. Under the provisions of that Act, a mine owner, if he were desirous of working within that protected area or such other protected area as any special Act of Parliament might have provided for a particular railway, had to give notice, and upon notice being given a counter-notice could be given by the railway company which entirely prohibited the mine owner from working in the protected area. If no such counter-notice was given by the railway company, then the mine owner was entitled to work and was not liable for any damage so caused unless such work was improper. The question whether a particular working was proper or not was a matter which not infrequently gave rise to disputes.

There is only one other matter with regard to the law existing before the Act of 1923 to which I need refer, and that is this, that it was decided by the House of Lords in *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (1) that as between vendor and purchaser there was nothing in the Railways Clauses Consolidation Act, 1845, which took away the common law right of support which a railway company had outside a protected area; but, as I understand that decision, it dealt only with the common law right of support, and does not necessarily apply to the right of support for the surface of the land burdened with buildings or other erections.

In those circumstances the Act of 1923 was passed, and no doubt one of the objects of the Act was to simplify and make further provision for the relationship between railways and mine owners in reference to support of the surface. The

(1) [1913] A. C. 11.

relevant part of the Act is Part II., and the first section to which I must refer is s. 15. Sect. 15 is in these terms: "The Railways Clauses Consolidation Act, 1845, as incorporated in any Act, order, or other instrument relating to a railway company passed or made after the passing of this Act, shall, except as otherwise expressly provided in that Act order or instrument, have effect as if for sections seventy-eight to eighty-five thereof, inclusive, the following provisions were substituted, and as if the First, Second and Third Schedules to this Act were inserted in that Act as the First, Second and Third Schedules thereto. 78.—(1.) If the mine owner of minerals lying under an area of protection as hereinafter defined is desirous of working any such minerals, he shall give to the company and also to the royalty owner (if any) notice of his intention so to do at least thirty days before the commencement of the working and on the receipt of such notice the company and the royalty owner respectively may cause the minerals to be inspected by any person appointed for the purpose by the company or royalty owner as the case may be. (2.) If it appears to the company that the working of any of the minerals to which such notice relates will be likely to damage the railway or works or any part thereof, the company may, at any time after the receipt of such notice, give a counter-notice to the mine owner requiring him to leave unworked all or any part of such minerals, and the counter-notice shall specify the minerals (hereinafter referred to as the specified minerals) so required to be left unworked and the particular portion of the railway or works (hereinafter referred to as the protected works) for the support of which the specified minerals are required to be left unworked. (3.) Where any such counter-notice had been served on the mine owner, he shall forthwith serve a copy thereof on the royalty owner (if any). (4.) Where any such counter-notice has been served on the mine owner, the specified minerals shall not be worked or got after the service of the counter-notice, and the company shall pay compensation to the mine owner and the royalty owner (if any) for the loss caused by the specified minerals being left unworked." Then sub-s. 5 provides what the area of protection is to be, and that area of protection is different from that provided by the original Act: "The area of protection in relation to any seam of minerals shall be the area comprising any railway or works of the company and such a lateral distance therefrom, on all or both sides thereof, as is equal at each point along the railway to one-half of the depth of the seam at that point or forty yards, whichever be the greater; and, when the said lateral distance exceeds forty yards, the area of protection shall be divided into two areas," and the two areas are defined. Then s. 78A provides for the compensation to be paid for leaving the minerals unworked where the railway company has given the mine owner a counter-notice. In this case no such counter-notice was given, and it is therefore unnecessary for me to consider that section further. Sect. 79, sub-s. 1, gives power to work minerals not affected by a counter-notice. Then s. 79A, sub-s. 1, is the section which is material: [His Lordship read s. 79A, sub-s. 1, and continued:] It is under that section that the railway company in this case is claiming the right of contribution. I need not make further reference to any of the sections of the Act until I come to s. 85B, sub-s. 2. It is under this sub-section that the defendant company are claiming that they are not under the liability to contribute to which they would appear prima facie to be subject by virtue of the earlier section. Before I read that section, it might be convenient just to note that in s. 85D (which is the interpretation section) the definition of a "mine owner" includes "the owner, lessee, or other person entitled to work and get minerals." Then there is a definition of "seam," "surface," "royalty," and "royalty owner" and "lease" includes "an underlease or other tenancy and a licence," and "lessee" includes "an under-lessee and a licensee." Now I will turn to sub-s. 2 of s. 85B: [His Lordship read s. 85B, sub-s. 2, and continued:] The plaintiff company say that that sub-section does not deprive them of their right to contribution, because any right to let down the surface which the defendant company possess was acquired by them under the leases granted to them in 1916 and 1920, and since at that date the railway company had long been the owners of the surface under grants made to them by the lessors of the mine, this sub-section does not apply.

The defendants, on the other hand, say they have a right to let down the surface because such a right was acquired by them by a title antecedent to the acquisition by the railway company of their interest in the surface, and they put their case, as I understand it, in two ways. They say that each of the persons from whom they derived title, who were in these three cases Lord Manvers, the Duke of Devonshire, and Sir Philip Hunloke respectively, had a title antecedent to the acquisition by the railway company of the surface, and that being so, the right which the defendant company has to let down the surface is one derived from a title antecedent to the acquisition by the railway company of the surface. That is how I understand their argument, and I hope I have put it correctly. That is the first proposition which they submit to me. But I think for reasons which I will state in a moment, that the defendants, in putting forward that argument, realized that some limit must be put upon the words if they are to be so construed. Therefore, I am invited further to say that the section should be read as limited to such persons as were actively exercising or had actively exercised the right, or had granted the right to some one else before the date of the railway company's title. Secondly it is said that, even if that be not the true construction of this section, in this particular case the title of the mine owners should be treated as having been acquired before the acquisition by the railway company of the surface, because they had the right under the earlier leases, and the right which they now have is the continuation of the pre-existing right of which the railway company must have had notice when they purchased. They invite me to say that in those circumstances they are under no liability to contribute. It is suggested that if that be not so, the railway company may be getting under this Act a benefit to which they ought not to be entitled, because it is said they probably had to pay less for their surface rights than they would otherwise have done, owing to the right to let down which was then in the defendant company or their predecessors in title, and that having bought the surface in those conditions it is unfair that they should now be entitled to compensation under this sub-section. With regard to that last point, it seems to me to be one to which I can give no weight at all. I have to construe this section of the Act, and whether it results in my giving to the railway company some benefit which they might otherwise not have had, or whether it results in imposing some obligation upon the defendant company under which they would not otherwise have been, are considerations which appear to me to be quite outside anything which I have to consider. The whole matter turns upon the construction of the actual language used in this sub-section.

Now I must turn again to the sub-section: "Nothing in this Act shall alter, diminish or affect any right to let down the surface, either unconditionally or subject to payment of compensation, or to any other condition, which a mine owner or royalty owner may possess, whether by statute grant lease agreement or otherwise, derived from a title antecedent to the acquisition by the company of their interest in the surface." If I read these words, "derived from a title antecedent to the acquisition by the company of their interest in the surface" in the way in which the defendants invite me to read them, without inserting the qualification which they suggest should be put upon them, it is plain, I think, that this portion of the Act would be rendered a nullity, because it is impossible to suppose a case in which, if the title is carried far enough back, a person will not be found in whom the right to the surface and the right to let down the surface were combined. In fact, if one had to go back to the earliest times of all one might find that these rights were originally vested in the Crown, since theoretically at any rate every fee simple originated in a grant from the Crown. Such a construction would render the section completely meaningless, and is therefore one which I must reject.

Mr. Cleveland-Stevens, appreciating that difficulty, therefore invites me to qualify that by saying that it must be limited to a person who is asserting or has asserted his right to let down the surface. I confess that I am very much puzzled to know what justification can be suggested for making such a qualification. I have read the words of sub-s. 2 and I have read the definition section, and I can find nothing in either of them which justifies me in interpolating into the Act words which are not there and do not seem to be necessarily implied in the circumstances.

If neither of those two meanings be the right one, in my judgment it is difficult to see what escape there is from the construction which the plaintiffs invite me to put upon this sub-section—namely, that the right to let down the surface referred to in the sub-section is a right in the mine owner derived from a title granted to him antecedent to the acquisition by the railway company of the surface, or to put it in another way, that in order that the mine owner may avail himself of this section he must show that, by a title granted to him or his predecessor and not by the title of his grantor he acquired the right to let down the surface prior to the acquisition of the surface by the railway company. If he can show that, then he clearly is within the provisions of this sub-section. If he cannot show that, for my own part I feel compelled to come to the conclusion that it avails him nothing that his grantor had a title antecedent to the acquisition by the railway company of the surface.

If that be the true construction of the sub-section, it must entitle the plaintiffs to the relief which they seek, unless I ought to adopt the other argument which has been pressed upon me on behalf of the defendants—namely, that even on that construction the defendants are entitled to the benefit of it, because their leases should be treated as continuations of leases existing antecedent to the acquisition by the railway company of the surface, which leases contained the right to let down the surface. It appears to me that it is quite impossible to give effect to that submission without disregarding the ordinary principles of law as to the effect of a surrender of a lease. Mr. Simonds was prepared to cite me authority upon the matter, but I ventured to think that that is so elementary that it did not require authority. The effect of the surrender of a lease, even though it be for the purpose of obtaining a new lease, is to put an end to the obligations and the benefits which are derived from that lease. The lease comes to an end notwithstanding that a new lease is put in its place which may be in the same terms as or different from the previous one, and the suggestion that the mine owner derives a title from the lease he has surrendered seems to me to be a contradiction in terms. I know not how any one can have a title from a lease which has been surrendered and thereby put an end to, and for this purpose it matters not whether the lease was surrendered and the relationship of lessor and lessee thereby ended for ever, or whether that relationship was renewed by a new lease. So far as the title is concerned, it ceased on the surrender of the old lease.

For those reasons I have come to the conclusion that I must give effect to the argument which has been addressed to me on behalf of the plaintiffs. I appreciate that it may seem somewhat hard that a mine owner who had acquired a right to let down the surface long before the railway company purchased the surface and who is still the mine owner, should not have the protection of the section. Unfortunately for him, although at the time no one could have foreseen it, a mine owner by surrendering his lease and taking a new lease deprived himself of the protection which he might otherwise have had under this sub-section.

That being so, I must make the declaration which the plaintiffs ask me to make in the statement of claim, and if it is necessary I will make an order for payment of the contribution.

Solicitor for plaintiffs: *I. B. Pritchard.*

Solicitors for defendants: *Ridsdale & Son, for Shipton, Hallewell & Co., Chesterfield.*

P. J. B.

LUXMOORE
and
FARWELL
JJ.

1934
Oct. 29, 30;
Nov. 19.

In re T. H. GODWIN.
Ex parte THE TRUSTEE *v.* M. E. MORRIS.

In re T. H. GODWIN.
Ex parte THE TRUSTEE *v.* THE BRITISH REINFORCED CONCRETE ENGINEERING COMPANY.

[No. 22 of 1932.]

Bankruptcy—Judgment Debtor—Execution levied—Goods seized by Sheriff—Debt and costs of execution paid direct by Debtor to Judgment Creditor—Withdrawal of Sheriff—No return to writ of execution—Subsequent Receiving Order on Petition of Debtor—"Completion of execution"—"Benefit of execution"—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 87—*Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 45, *sub-s.* 1; *s.* 46—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11, *sub-ss.* 1, 2—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 40, 41.

On June 1, 1932, a creditor obtained a judgment against the bankrupt for 111*l.* 1*s.* On June 16 the judgment creditor caused execution to be levied against the bankrupt's goods for 121*l.* 6*s.* 6*d.* and costs of execution. The sheriff went into possession. On July 2 the bankrupt paid to the judgment creditor a sum of 60*l.*, and on July 8 a further sum of 60*l.*, and on July 22 he paid to the judgment creditor a further sum of 13*l.* 9*s.* 3*d.*, making in all the total sum of 133*l.* 9*s.* 3*d.*, being the full amount due under the judgment, together with the costs of the execution. On August 3, 1932, the judgment creditor instructed the sheriff to withdraw, which he did on the same date, his costs being paid by the judgment creditor. The withdrawal was unconditional and no power of re-entry was reserved. On November 21, 1932, the bankrupt filed his own petition, and a receiving order was made against him on that date. On December 6 he was adjudged bankrupt.

The trustee in bankruptcy moved in the county court of Staffordshire for: (1.) A declaration that the payments made by the bankrupt to the judgment creditor were void as against the trustee by virtue of ss. 40 and 41 of the Bankruptcy Act, 1914 (1);

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(1) Sect. 40, sub-s. 1: "Where a creditor has issued execution against the goods or lands of a debtor . . . . he shall not be entitled to retain the benefit of the execution . . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Sub-s. 2: "For the purposes

(2.) An order that the judgment creditor should repay to the trustee in bankruptcy the sums paid to him by the bankrupt by virtue of the same sections. The county court judge dismissed the application and the trustee appealed:—

Held, dismissing the appeal, that the phrase "the benefit of the execution" in s. 40, sub-s. 1, referred solely to the protection obtained by an execution creditor by reason of the issue of a writ of fi. fa. and its delivery to the sheriff, and did not include any payments to an execution creditor whether by the sheriff or by the judgment creditor; the section related only to executions which were in fact in existence at one or other of the appropriate dates mentioned in the section, and had no reference to an execution which had been unconditionally withdrawn before any of those dates.

BANKRUPTCY MOTIONS.

On June 1, 1932, the respondent Morris obtained a judgment against the bankrupt for 111*l.* 1*s.* and costs. On June 16 he caused execution to be levied against the bankrupt's goods for 121*l.* 6*s.* 6*d.* and the costs of execution. The sheriff went into possession. On July 2, 1932, the bankrupt paid to the respondent the sum of 60*l.* on account of the judgment debt, he paid a further sum of 60*l.* on July 8, and a sum of 13*l.* 9*s.* 3*d.* on July 22, making in all the sum of 133*l.* 9*s.* 3*d.*, being the full amount due under the judgment, together with the costs of the execution. On August 3, 1932, the respondent instructed the sheriff to withdraw, which he did on the same date, his

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of this Act, an execution against goods is completed by seizure and sale. . . . ."

Sect. 41, sub-s. 1: "Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion . . . . by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made . . . . , the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver. . . . ."

Sub-s. 2: "Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods . . . . are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution . . . . and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor."

costs being paid by the respondent. No part of the judgment debt remained outstanding on that date. The withdrawal was unconditional and no power of re-entry was reserved. The respondents, the British Reinforced Concrete Engineering Company, obtained judgment against the bankrupt for the sum of 301*l.* 10*s.* 3*d.* and costs on January 19, 1932. Execution was levied against the bankrupt's goods on February 13 for the sum of 316*l.* 17*s.* and costs. The sheriff entered into possession, and remained in possession until May 7, 1932. On March 5 the bankrupt paid to the respondents the sum of 140*l.*; on March 12 the sum of 50*l.*; on March 23 the sum of 50*l.*; on April 20 the sum of 22*l.* 10*s.*; on April 21 the sum of 17*l.* 10*s.*; and on May 7 the sum of 54*l.* 9*s.* 4*d.*, making in the aggregate the sum of 334*l.* 9*s.* 4*d.*, being the full amount due under the judgment, together with the costs of the execution. On May 7 the sheriff was directed by the respondents to withdraw, and he withdrew, his costs being paid by the respondents. In this case, too, the withdrawal was unconditional, and no power of re-entry was reserved. In neither case was any return made to the writ by the sheriff, nor was any payment made to him by the bankrupt, all the payments being made direct to the judgment creditors. On November 21, 1932, the bankrupt filed his own petition, and a receiving order was made against him on that date. On December 6 he was adjudicated bankrupt.

The trustee in bankruptcy moved in the county court, as stated in the headnote. He moved in both cases. His applications were dismissed, and his appeals against the orders of the county court now came on for hearing.

Tindale Davis for the appellant. Under s. 40, sub-s. 1, of the Bankruptcy Act, 1914, a judgment creditor is not entitled to retain the benefit of the execution against the trustee in bankruptcy unless he has completed the execution before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor. Then sub-s. 2 makes it clear that the execution can be completed by the seizure and sale of the goods, and under s. 41, sub-s. 1, the execution is completed by the receipt or recovery by the sheriff of the full amount of the levy. Those are the only two methods by which the execution can be completed, and in either case the sheriff should make a return to the writ. The point is clearly dealt with by Horridge J. in *In re Godding.* (1) The right to retain the benefit of the execution is dealt with in many other cases. In the present cases the executions were never completed, and the respondents are not entitled to retain, as against the trustee in bankruptcy, any benefits of the executions they may have obtained.

[He also cited *In re Evans* (2); *Figg* v. *Moore Bros.* (3); *Burns-Burns' Trustee* v. *Brown* (4); *In re Jenkins* (5); *In re Pollock and Pendle* (6); *In re P. E. and B. E. Kern* (7); *In re Brelsford.* (8)]

O. Kean for the respondent Morris. *In re Fairley* (9) makes it plain that the definition of "completion" in s. 40 is not exhaustive; a return of nulla bona may be "completion." Sect. 40 deals with restrictions on execution creditors; s. 41 with the duties of the sheriff. Here the debts had been satisfied, the sheriffs withdrawn, and there was nothing more that could be done. The executions were complete. In none of the cases cited was it stated anywhere that the execution had not been completed because the money had not passed through the hands of the sheriff: see Channell and Wright JJ. in *In re Ford.* (10)

J. B. Blagden for the respondents, the British Reinforced Concrete Engineering Company. Astbury J. states in *In re Fairley* (11) that s. 40 only gives a few of the many ways in which there may be completion. The whole question is whether the creditor or sheriff could get anything further under the writ: here they could get nothing further.

[He cited *In re Hobson.* (12)]

Tindale Davis in reply. *In re Hobson* (12) has no bearing

(1) [1914] 2 K. B. 70.
(2) (1916) 2 Han. Bk. Rep. 111.
(3) [1894] 2 Q. B. 690.
(4) [1895] 1 Q. B. 324.
(5) (1904) 90 L. T. 65.
(6) (1902) 87 L. T. 238.
(7) [1932] 1 Ch. 555.
(8) [1932] 1 Ch. 24.
(9) [1922] 2 Ch. 791.
(10) [1900] 1 Q. B. 264.
(11) [1922] 2 Ch. 791, 795.
(12) (1886) 33 Ch. D. 493.

on this case. The only form of completion in s. 45 of the Bankruptcy Act, 1883, is seizure and sale.

[He cited *Johns* v. *Pink* (1) and *In re Pearson.* (2)]

Cur. adv. vult.

1934. Nov. 19. LUXMOORE J. The judgment I am about to deliver is the judgment of the Court (LUXMOORE and FARWELL JJ.).

These appeals raise a question with regard to moneys paid direct by a judgment debtor to his creditor after execution had been issued and goods seized by the sheriff. In each appeal the point for decision is precisely the same. There is no dispute of fact.

Both appeals arise out of the bankruptcy of one Thomas Harold Godwin. He carried on business as a builder in the Potteries. For a long time before he filed his petition in bankruptcy he was in serious financial difficulties. There were, we have been told, some 130 executions levied against his property between January 1 and November 21, 1932. On the last-mentioned date he filed his own petition, and a receiving order was made against him on the same day. He was adjudicated bankrupt on December 6, 1932.

[His Lordship stated the facts and continued :] Although the payments to the judgment creditor were in each case sufficient to extinguish all liability under the judgments, and although the last payment was made in one case more than six months, and in the other four months, before the presentation of the bankruptcy petition, the trustee in bankruptcy instituted proceedings in the County Court of Warwickshire, holden at Coventry, for the recovery of the whole of the moneys paid by the bankrupt to these two judgment creditors. He based his claim in each case on a particular construction of the provisions of ss. 40 and 41 of the Bankruptcy Act, 1914, and relied upon a number of decided cases in support of that contention. The county court judge dismissed each application, and ordered the

(1) [1900] 1 Ch. 296.

(2) (1886) 3 Mor. 187.

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trustee in bankruptcy to pay the costs. The trustee in bankruptcy now appeals to this Court from the decision of the county court judge.

Sects. 40 and 41 of the Bankruptcy Act, 1914, so far as material, are in the following terms: [His Lordship read ss. 40 and 41, and continued:] It is argued on behalf of the trustee in bankruptcy that the judgment creditor having been paid the full amount due under the judgment, has in each case obtained the benefit of the execution because he has been paid the full amount due under his judgment, and that he is not entitled to retain the moneys so paid, because the execution was not completed before the appropriate date. It is said that s. 40, sub-s. 1, imposes a statutory limitation on the right of a judgment creditor, who has issued execution against the goods of a judgment debtor, to retain as against the trustee in the subsequent bankruptcy of the debtor anything recovered or received under the execution, unless the execution is completed, and that subject only to the operation of the Statutes of Limitation this applies no matter how long before the date of the subsequent bankruptcy the amount was recovered or received.

It is further said that the completion of the execution has an exhaustive statutory definition, and that under it an execution is not completed unless (1.) the goods seized are sold, or (2.) the full amount for which the execution was issued is recovered or received by the sheriff. It was also said, although no great reliance was placed on this part of the argument, that in each of these cases an execution is incomplete unless the sheriff makes a return to the writ stating either that the goods have been sold and the amount has been recovered, or that it has been withdrawn on payment in full of the amount claimed, and the costs.

The argument is certainly startling, for if it is right, an execution creditor who has received the full amount of his debt direct from the judgment creditor is liable to return that sum to the trustee in a subsequent bankruptcy, although the money was received and the execution unconditionally withdrawn many years before the adjudication, the only limitation on the liability being the expiration of the period prescribed by the appropriate Statutes of Limitation. It was not rendered less startling when it was admitted by counsel supporting it that if the payments in this case had been made by the judgment creditor to the sheriff instead of to the execution creditors direct, the amounts paid could not have been recovered, and that the position would be the same if the payments had been made without any writ of fi. fa. having been issued.

The first question which arises on the construction of the section is what is the meaning of the phrase " the benefit of the execution." In the argument put forward on behalf of the appellants, " the benefit of the execution " was assumed to cover any benefit resulting to the creditor which might be attributed to the issue of the writ of fi. fa. It seems to us that the whole foundation of the argument fails if this assumption is incorrect. It is to be observed that the phrase is " the benefit of the execution," not " any benefit from the execution," or " any benefit arising out of the execution " ; and further, that there is no suggestion anywhere in this or the succeeding section of any repayment of money to the trustee in bankruptcy by the execution creditor.

Before considering the question of construction of these sections, it is necessary to bear in mind what is the legal effect of the issue of a writ of fi. fa. and its delivery to the sheriff, and also to consider how the provisions of the sections in question have been developed from the earlier enactments, and, in doing so, to ascertain what was the object of the developments, and to what particular defect or defects in the earlier enactments they were directed. First, what is the position at common law, and apart from the statutory provisions in Bankruptcy Acts, when an execution creditor issues a writ of fi. fa. and delivers it to the sheriff? From the moment of its delivery, the goods of the judgment debtor are bound for the benefit of the execution creditor. If his writ is the only writ, or if it is the first writ delivered to the sheriff, the execution creditor has the first right to the resulting charge on the goods. This charge puts the execution creditor in a better position than the other creditors of the judgment debtor. When the sheriff has seized the goods, no one else can deal with them so long as the execution remains in force. This result can properly be described as the benefit of the execution from the execution creditor's point of view. Certain limitations on those rights have been imposed by Parliament. The latest development of these limitations is to be found in the sections which we have to construe. Sect. 40, sub-ss. 1 and 2, is for all practical purposes in the same form as s. 45, sub-ss. 1 and 2, of the Bankruptcy Act, 1883. Before the last-mentioned Act was passed, the only limitation on the execution creditor's common law rights under a writ of fi. fa. was imposed by s. 87 of the Bankruptcy Act, 1869. This section provided that where the sheriff had seized and sold a judgment debtor's goods, he should hold the proceeds for fourteen days after the sale; if during that period bankruptcy proceedings supervened—we need not refer in detail to the particular events enumerated in the section—the sheriff was to hold the proceeds of sale, after deducting his expenses, on trust for the trustee in bankruptcy of the judgment debtor. There was no express provision for the vacation of the execution and the handing over of the goods to the trustee where there had been no sale by the sheriff. This provision was retained in the Bankruptcy Act, 1883, and certain additional limitations were added. Sect. 45, sub-s. 1, contained for the first time the provision to be found in substantially the same terms in s. 40, sub-s. 1, of the Act of 1914. It stated in general terms that an execution creditor cannot retain the benefit of the execution against the judgment debtor's trustee in bankruptcy unless the execution has been completed. There was no provision that the execution creditor was to repay anything he had already received. If the execution was not in force at the date of the bankruptcy because it had been withdrawn unconditionally by the execution creditor (whether because his debt and costs had been paid in full, or otherwise) there was no embargo on the debtor's goods, and nothing to prevent them being taken by the trustee in his bankruptcy for the benefit of the general body of creditors. The case was different if

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there was a subsisting execution in which no sale had taken place, for in that case, unless the benefit which the execution creditor had obtained by the issue of his writ of fi. fa. was extinguished, the creditor would obtain an advantage over the general body of the creditors. This was the only point aimed at by the section. There was no hardship on the general body of creditors if, before the bankruptcy, the execution creditor was either paid out by the debtor in order to prevent his goods being sold under the execution, or was satisfied out of the proceeds of sale of the goods seized.

We are satisfied that on the true construction of s. 45, sub-s. 1, of the Act of 1883, " the benefit of the execution " refers to the charge on the debtor's goods obtained by the execution creditor by the issue of his writ, and was not intended to include, and does not include, any payment which might have resulted directly or indirectly by reason of the writ having been issued.

After the Act of 1883 was passed a question arose with regard to moneys paid by the judgment debtor to the sheriff in order to avoid sale. An attempt was made on behalf of a trustee in bankruptcy to recover these from the sheriff on the ground that the transaction operated as a sale by the sheriff to the judgment debtor of the goods which were released in consequence of the payment. The question came before a Divisional Court constituted by Pollock B. and Cave J. in *In re Pearson.* (1) The claim of the trustee in bankruptcy was negatived. The ground of the decision was that the money was paid to prevent the execution being completed, and that there was no attempt to retain the benefit of the execution, for the creditor no longer wanted it. Sect. 11 of the Bankruptcy Act, 1890, was apparently passed to meet this decision, and to place moneys paid to the sheriff in order to avoid a sale under an execution on the same footing as the proceeds of sale under an execution. There is no ground for supposing that it was intended to have any retrospective effect on moneys received under an execution which, although not resulting in payment in full of the judgment debt and costs, had been withdrawn unconditionally long before the subsequent bankruptcy.

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(1) 3 Mor. 187.

Sect. 11 of the Bankruptcy Act, 1890, provides by sub-s. 1 that " Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver," and provision is made for the costs of the execution. It seems that the object of this section was to provide in express terms for the handing over in the cases set out of all goods seized and unsold by the sheriff to the trustee in bankruptcy, and also for the handing over in the like manner of all money received by him in part satisfaction of the execution. The sub-section expressly states that the provisions are not applicable to the case where the sheriff has recovered the full amount of the judgment debt and costs by sale of the goods seized, or has received the same amount. In each of those cases the execution has become ineffective and of no further use to protect the execution creditor.

Sub-s. 2 provides that " Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor." This sub-section contains for the first time a reference to money paid to the sheriff to avoid a sale under the execution, and places it in precisely the same position as the proceeds of sale of goods seized under the execution.

The provisions of s. 11 of the Act of 1890 are, together with the provisions of ss. 45 and 46 of the Act of 1883, embodied in ss. 40 and 41 of the Act of 1914.

In our judgment, having regard to the nature of the protection obtained at common law by an execution creditor. and to the manner in which, and the purpose for which, the provisions of ss. 40 and 41 have been developed, and to the further fact that there is no mention in either of the sections of any payment by the execution creditor to the trustee in bankruptcy, the phrase "the benefit of the execution," on the true construction of the section, refers solely to the protection obtained by an execution creditor by reason of the issue of the writ of fi. fa. and its delivery to the sheriff, and does not describe, and was never intended to describe, any of the payments to an execution creditor whether by the sheriff or by the judgment debtor. The section consequently relates only to executions which are in fact in existence at one or other of the appropriate dates mentioned in the section, and has no reference to an execution which has been unconditionally withdrawn long before any of those dates.

On this view of the construction, there is no need to consider what is the meaning of the phrase "completion of the execution," for there was in fact no subsisting execution of which the execution creditor was seeking to retain the benefit, and consequently no liability on either of the appellants to pay the sums claimed or any part of them to the trustee in bankruptcy. Reliance was placed during the argument on behalf of the trustee in bankruptcy on a number of decided cases. None of them were directed to the consideration of the phrase "the benefit of the execution," and in each of them there was either an execution subsisting at the date of the bankruptcy, or the payment which was impeached had been made to the sheriff or to the execution creditor within the fourteen days referred to in s. 41, sub-s. 2, of the Act of 1914 in such circumstances as would have rendered it liable to be paid to the trustee in the judgment debtor's subsequent bankruptcy by the sheriff if it had been paid to him instead of to the creditor.

In the view we have taken of the construction of s. 40, these cases have no bearing on the present case, and for that reason we do not think it necessary to refer to any of them, except to *In re Godding.* (1) Great reliance was placed on this decision for the purpose of supporting the argument that completion of an execution could only take place either by seizure and sale or by payment in full to the sheriff. Horridge J. appears to have assumed, without any argument being directed to the point, that the phrase " benefit of the execution " was used in s. 40 of the Act of 1914 in the wide sense as referring to any beneficial result flowing directly or indirectly from the fact that the creditor had issued execution, and without regard to whether the execution had been withdrawn conditionally or unconditionally. This view was unnecessary to the decision, and we think it can therefore properly be treated as dictum. If, however, it was necessary to the decision, it is not binding on this Court, and we find ourselves unable to agree with it.

What we have said with regard to the construction of ss. 40 and 41 applies only to cases where the execution has been unconditionally withdrawn, and has no application to those cases where the execution has only been withdrawn conditionally, and is therefore still in force at the appropriate dates if bankruptcy subsequently occurs. We have deliberately refrained from saying anything with regard to that position.

In our judgment the decision of the county court judge was right, and each of the appeals fails and must be dismissed. The appellant must pay the costs of each appeal.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for Kent & Jones, Longton.*

Solicitors for the respondent Morris: *Gregory, Rowcliffe & Co., for Batterbee, Jones & Jones, Portmadoc.*

Solicitors for the respondents, The British Reinforced Concrete Engineering Company: *Leonard Tubbs & Co., for H. Wallace-Copland, Stafford.*

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(1) [1914] 2 K. B. 70.

P. J. B.

In re SOUTH EAST LANCASHIRE INSURANCE COMPANY, LIMITED.

C. A.
1934
Nov. 1, 2, 22.

[Nos. 00837 and 00844 of 1931.]

Company—Winding-up—Insurance Company—Motor Vehicle Insurance business—Provision against Third party risks—Deposit by Company with Accountant-General—Proofs of holders of Motor Vehicle Policies—Priority—Security of Policy-holders as against general Creditors—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 2, *sub-ss.* 1, 2; *s.* 3, *sub-ss.* 1, 2; *s.* 31; *s.* 32 (*d*)—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *Part II., ss.* 35, 36, 37, 42, *sub-ss.* 1, 2; *s.* 43, *sub-ss.* 1, 2.

In the winding-up of an insurance company carrying on motor vehicle insurance business, the deposit of 15,000*l.* made by the company with the Accountant-General of the Supreme Court under the Assurance Companies Act, 1909, as amended by s. 42 of the Road Traffic Act, 1930, forms assets of the company available for distribution among all its creditors generally, and is not primarily applicable to the satisfaction of the claims of the holders of motor vehicle insurance policies issued by the company.

Decision of Eve J. [1934] Ch. 374 reversed.

APPEAL from a decision of Eve J. (1)

On a petition presented on December 31, 1931, an order was made for the compulsory winding-up of the South East Lancashire Insurance Company, Ld. (hereinafter called "the company"). The assets amounted to about 25,000*l.*, but the liabilities were greatly in excess of that amount. The Official Receiver had been appointed provisional liquidator. The company carried on general insurance business and motor vehicle insurance business.

By the present summons the liquidator asked the Court to determine (1.) whether the sum of 15,000*l.* deposited by the company under the Assurance Companies Act, 1909, as amended by s. 42 of the Road Traffic Act, 1930, formed part of the general assets of the company available for all its creditors, or whether the same was primarily applicable to the satisfaction of any and what claims under the motor vehicle insurance policies issued by the company; (2.) whether the right of proof by holders of motor vehicle insurance policies in the liquidation of the company was regulated by Sch. VI., para. (*c*), of the Assurance Companies Act, 1909, on the footing that that paragraph was made applicable to motor vehicle insurance policies by s. 42 of the Road Traffic Act, 1930.

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(1) [1934] Ch. 374.

The summons originally came before Eve J. on November 4, 1932, when several points were argued, of which the above question only calls for a report. Judgment was delivered on November 10 to the same effect as in the present decision—namely, that the 15,000*l.* deposit was primarily applicable in the payment of all claims under the motor vehicle insurance policies. An appeal was presented, and the Court of Appeal directed the case to be reheard on the ground that holders of motor vehicle insurance policies claiming in respect of third party risks should have been, but were not, separately represented from holders of such policies claiming in respect of injury or damage to themselves. Further respondents having been added the summons was restored for re-argument.

Eve J. on March 27, 1934, stated that he abided by his previous decision and held that the deposit of 15,000*l.* was primarily liable in satisfaction of all claims made under motor policies issued by the company, without preferring claims by third parties, and to the exclusion of other creditors claiming otherwise than under motor policies.

A. J. Margary, a general creditor in respect of rent, appealed. The appeal was heard on November 1 and 2, 1934.

L. W. Byrne for the appellant. The deposit of 15,000*l.* is general assets of the insurance company available for the creditors of the company generally, and it is not, as Eve J. has held, primarily applicable to satisfy claims of holders of motor vehicle insurance policies. The deposit was made under the Assurance Companies Act, 1909, as amended by the Road Traffic Act, 1930, for the purpose of giving evidence of financial reliability. Sect. 1 of the Act of 1909 applies to five classes of business: life assurance, fire insurance, accident insurance, employers' liability insurance and bond investment, but by s. 42 of the Act of 1930 motor vehicle insurance business is added. Sect. 2 of the Act of 1909 provides for a deposit of 20,000*l.*, and sub-s. 4 provides for a deposit in respect of each class of business carried on, and when a separate assurance fund is required it is to be deemed to form part of that fund. Then s. 3 provides for separate assurance funds when a company is transacting more than one class of business and that a fund of any particular class is to be the security of the policy holders of that class. Throughout the Act, however, a distinction is made between fire and accident assurance on the one hand and life and employers' liability insurance on the other. Sect. 31 (*d*) provides that it shall not be necessary to make a deposit in respect of fire insurance business where the company has made a deposit in respect of any other class of business. Sect. 32 deals with a company carrying on accident insurance business, and by s. 42, sub-s. 2, of the Act of 1930 the Act of 1909 is made applicable to motor insurance business in the same way as it applies to accident insurance business with certain modifications. Thus the deposit is only to be 15,000*l.*, and ss. 5 and 6 and paras. (*a*), (*b*) and (*c*) of s. 32 of the Act of 1909 are not to apply.

Further, the relief given when a company is carrying on more than one class of business shall, when motor insurance business is being carried on, be subject to the total sum deposited being not less than 35,000*l.* Sect. 32 (*d*) of the Act of 1909 makes the provision for keeping separate funds where more than one class of assurance business is being carried on inapplicable as respects accident insurance business and therefore in respect of motor insurance business. The company in this case was carrying on fire and motor insurance businesses. It follows that s. 3 of the Act of 1909 does not apply to this case.

Sect. 35 of the Act of 1930 provides for third party insurance and s. 36 lays down the requisites of a policy, one of which is that it must be issued by an authorized insurer, by which is meant (amongst others) an assurance company which has complied with the requirements with respect to deposits.

Sect. 43 has no application to a person insured against third-party risks under the Act of 1909 as amended by the

Act of 1930 and sub-s. 1 of s. 43. It applies only to cases under ss. 35 and 37 where a private person has deposited 15,000*l.* under s. 35, sub-s. 4, in order to escape the obligation to take out a policy against third party risks or where security has been given in respect of third party risks for the same purpose and a deposit has been made by the person carrying on the business of giving a security. It is in these cases only that provision is made by s. 43 that the deposit shall be primarily liable to discharge third party claims.

It is contended therefore that on an examination of the relevant sections of the Acts the deposit of 15,000*l.* in this case is not applicable in the first instance to meet claims in respect of third party risk insurance policies but is available for the creditors of the company generally. This view is supported by the fact that the duty of keeping separate accounts is abrogated by s. 32 (*d*) of the Act of 1909.

C. E. Harman for the respondent Midgley, a policy holder against whom a third party had obtained judgment in respect of an accident causing bodily injury. The object of Part II. of the Road Traffic Act, 1930, was to deal with third party risks, and for that purpose the Legislature created a new class of insurance business. It is really the injured third parties in respect of whom liability has been incurred by insurers for whom it is sought to make the deposit of 15,000*l.*, primarily applicable. If, as Eve J. held, s. 43 of the Act of 1930 applies to the insurance company's deposit of 15,000*l.* it follows that the liabilities to injured third parties are a primary charge on the deposit. The difficulty arises from the fact that s. 43 refers only to deposits made under ss. 35 and 37 of the Act but not to the deposit required by s. 36, sub-s. 3. It cannot have been the intention of the Legislature, however, to give the security of the deposited fund in cases under ss. 35 and 37 only. The insurer is intended to have the security of the deposit in such a case as this.

E. H. Blain for the respondent Phillips, an engineer, employed to inspect cars on behalf of the company, contended that no limitation could be put upon the fund. The fund should go to the persons whose claims arose under the motor business whether they were policy holders or not. In *In re National Standard Life Assurance Corporation* (1) Neville J. was dealing with a case in which there was both a fund and a deposit.

H. S. G. Buckmaster for the respondent Sturge, an underwriter, supported the same view.

H. Glyn-Jones for the respondent Oman, claiming under a policy insuring against personal risks, contended that s. 42 defined the nature of the insurance business to be added to the Act of 1909 and did not give any priority to third party risks.

C. W. Turner for the liquidator.

L. W. Byrne replied.

Cur. adv. vult.

1934. Nov. 22. The following judgments were read :—

Lord Hanworth M.R. On December 31, 1931, an order was made for the compulsory winding-up of the South East Lancashire Insurance Company, Ld. The liabilities greatly exceeded the assets. This appeal is brought from the decision of Eve J. upon a summons taken out by the liquidator which asks : (1.) Whether the sum of 15,000*l.* deposited by the company under the Assurance Companies Act, 1909, as amended by s. 42 of the Road Traffic Act, 1930, formed part of the general assets of the company available for all its creditors, or whether the same was primarily applicable to the satisfaction of any and what claims under the motor vehicle insurance policies issued by the company.

The case came before this Court on appeal from Eve J. on March 8, 1933, when it was ordered that the summons be referred back to the learned judge for further hearing after the summons had been amended by making representatives of several classes of creditors respondents to it—namely : (*a*) persons who have become creditors in connection with the company's business of motor vehicle insurance otherwise than under policies ; (*b*) general creditors other than those in class (*a*) ; (*c*) holders of motor vehicle insurance policies in respect of which liabilities on account of death or bodily injury to third parties have been incurred but not discharged by the company; (*d*) holders of motor vehicle insurance policies in respect of which liabilities have been incurred or a right of proof has arisen otherwise than on account of the third party risks above referred to.

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(1) [1917] 1 Ch. 193.

After the amendments had been duly made the summons came again before Eve J., who on March 27, 1934, made an order in terms which adhered to his original order—that is to the effect that the said sum of 15,000*l.* is primarily liable to meet all claims of holders of motor vehicle insurance policies and not merely claims in respect of third party risks, and is not, except subject thereto, assets of the company available for distribution among its creditors generally.

From that decision this appeal is taken to this Court. It has been argued in particular by Mr. Byrne on behalf of a general creditor in respect of rent, and by Mr. Harman on behalf of a policy holder against whom a third party had recovered judgment in respect of an accident causing bodily injury who desires to limit the liability of the fund primarily to third party risks, and by other counsel who fall into line with one or other of the above views or who support the order made by Eve J.

The sum of 15,000*l.* is deposited under the Assurance Companies Act, 1909, s. 1, as added to by s. 42, sub-s. 1, of the Road Traffic Act, 1930.

The result of reading those sections together is that persons, or bodies of persons, whether corporate or unincorporate, who carry on within the United Kingdom insurance business of the class known as motor vehicle insurance business, are required to deposit 15,000*l.* with the Paymaster-General for and on behalf of the Supreme Court.

Motor vehicle insurance business is further defined, or described, in s. 42, sub-s. 1, as the business of effecting contracts of insurance against loss of, or damage to, or arising out of or in connection with the use of motor vehicles including third party risks.

It is provided by s. 42, sub-s. 2, that where an assurance company carries on motor vehicle insurance business, the Act of 1909 is to apply in respect of that business in the same way as it applies to accident insurance business, but with some important modifications, for ss. 5 and 6, and s. 32 (*a*), (*b*) and (*c*), are not to apply.

Thus an actuarial report and abstract required to be made in the case of other assurance companies is not required; nor, under s. 6, is a statement of its assurance business to be prepared.

But inasmuch as s. 32 (*d*) is left applicable to motor vehicle insurance as it is to accident insurance business, the immunity from keeping separate funds, which it gives to accident insurance business, when more than one class of assurance business is transacted by the company, is extended to and covers motor vehicle insurance.

So far, therefore, it would seem that although there is to be a deposit made in respect of the motor vehicle insurance business, that business is not trammelled in as full a manner as accident assurance had been by s. 32 of the Act of 1909; nor is there any segregation of one sort of risk or policy undertaken or issued in the course of carrying on motor vehicle insurance business from any other sort. All that is done is to indicate that third party risks are to be included as risks which arise out of and in connection with the use of motor vehicles.

Sect. 35 of the Act of 1930 requires users of motor vehicles on a road to be covered by a policy of insurance or to provide a security in respect of third party risks and imposes penalties upon persons who contravene the requirements of the section. But as an alternative to being covered by a policy, a person can under sub-s. 4 deposit with the Accountant-General of the Supreme Court for and on behalf of the Supreme Court 15,000*l.* Thus by this s. 35 users of motor vehicles must either be covered by a policy of insurance which will answer third party claims, or have deposited 15,000*l.*, which in effect is an equivalent security that can be reached if a third party establishes a liability upon the user of a motor vehicle.

Sect. 36 lays down what are the requirements which a policy of insurance, or covering note, must fulfil if it is to be taken

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as a policy of insurance satisfying s. 35 and the time at which it is to become effective; and s. 37 similarly imposes the requirements in respect of securities which are the alternative of policies of insurance.

Sect. 43, in my judgment, deals only with the deposits that have been made with the Accountant-General as securities, and as alternative to the policies of insurance; and appropriates those securities to the primary purpose for which they were deposited—namely, the liabilities including third party risks that more usually are covered by a policy of insurance, but which can be met by a deposit or security under the facilities which are provided by s. 35, sub-s. 4, if the requirements in relation to those facilities laid down by s. 37 are complied with.

This view is, I think, strengthened by sub-s. 2, which applies rules made in reference to deposits by insurers carrying on motor vehicle insurance business to the deposit made directly by a person under s. 35, sub-s. 4.

In the Act of 1909 distinct classes of assurance are severally dealt with: s. 30 deals with life assurance; s. 31 with fire insurance; s. 33 with employer's liability insurance; s. 32 with accident assurance. It is the latter—accident assurance—which is selected as the type of assurance, to which motor vehicle assurance is to conform with very serious modifications. Particularly the requirement of separate funds for each class of assurance is by s. 32 (*d*) made not applicable to accident, and so it is not applicable to motor vehicle insurance.

The general provision in s. 3 of the Act of 1909 requiring separate funds to be kept in respect of each class of assurance business is not, in my opinion, to be construed so as to break up motor vehicle insurance into several categories, of which third party risks would be one, standing apart from other risks of loss or damage arising out of or in connection with the use of motor vehicles.

For these reasons I agree with the result reached by Eve J., that third party risks cannot be separated from the other risks insured by motor vehicle insurance.

There remains the question whether the 15,000*l.* is to be held by the liquidator as part of the general assets of the company available for distribution among its creditors generally.

It is argued that s. 3, sub-s. 2, of the Act of 1909 applies. It opens with the words "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class."

This section seems appropriate to cases where a company carries on assurance against risks attaching in life, fire, or employer's liability business, and where the responsibility of each fund to meet its liabilities, actuarially determined, is important and ought not to be imperilled by losses attaching from other classes of risks.

The "classes" of assurance business are those which fall into the categories of life, fire, employer's liability, accident, not the several risks which may be covered within those categories. A policy against loss by fire does not fall into a different category according as it covers buildings or furniture or art treasures.

I find great difficulty in attaching the terms of the section to a single class of business—motor vehicle business—in respect of which the duty of keeping separate funds is abrogated by s. 32 (*d*) of the Act of 1909. I have already considered the effect of s. 43, and I cannot find in it an appropriation of the fund of 15,000*l.* as claimed by those who represent third party risks. In this view there is nothing which can be relied upon to take this sum out of the reach of the general body of creditors. The appeal on behalf of the general creditors must therefore be allowed, and an appropriate declaration made.

Romer L.J. The question to be determined upon this appeal is how a certain sum of 15,000*l.* deposited by the South East Lancashire Insurance Company with the Accountant-General ought to be dealt with in the winding-up of that company. In order to determine that question it is necessary in the first place to consider the circumstances in which the deposit was made.

The company in question was at all material times carrying on the business of fire insurance and motor vehicle insurance, the issuing of motor vehicle insurances constituting about nine-tenths of its total business. It was therefore a company to which the provisions of the Assurance Companies Act, 1909, as extended by s. 42 of the Road Traffic Act, 1930, were applicable. Now it was provided by s. 1 of the earlier Act that it should apply to all assurance companies as defined in that section who carried on assurance business of all or any of the classes therein specified. Included amongst such classes specified under the letters (*a*) to (*c*) inclusive were the businesses of fire and accident insurance businesses but not that of motor vehicle insurance. By s. 2, sub-s. 1, it is provided that every assurance company shall deposit and keep deposited with the Paymaster-General, now the Accountant-General, the sum of 20,000*l.* Sub-s. 4 of that section is in the following terms: "Where a company carries on, or intends to carry on, assurance business of more than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund."

Sect. 3 so far as material is as follows: "(1.) In the case of an assurance company transacting . . . . more than one class of assurance business, a separate account shall be kept of all receipts in respect of . . . . each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name. (2.) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

By s. 31 it is amongst other things provided that where a company carries on fire insurance business the provisions of the Act as to deposits to be made shall not apply with respect to the fire insurance business if (as happened in the case of the South East Lancashire Company) the company has commenced to carry on that business before the passing of the Act.

Sect. 32, which relates to accident insurance business, is of importance in the present case for reasons that will appear later. So far as is material for the present purpose it provides as follows: "Where a company carries on accident insurance business, this Act shall apply with respect to that business, subject to the following modifications :—. . . . (*d*) So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects accident insurance business."

Attention must now be called to s. 42 of the Road Traffic Act, 1930. So far as material for the present purpose it is in the words following: "(1.) Section one of the Assurance Companies Act, 1909, shall have effect as if after paragraph (*e*) thereof there were added the following paragraph :—(*f*) motor vehicle insurance business, that is to say, the business of effecting contracts of insurance against loss of, or damage to or arising out of or in connection with the use of, motor vehicles, including third party risks. (2.) Where an assurance company within the meaning of the Assurance Companies Act, 1909, carries on motor vehicle insurance business, that Act shall apply with respect to that business in the same way as it applies to accident insurance business subject to the following modifications :—. . . . (*b*) If the company also carries on assurance business of some other class, the reference in subsection (4.) of the said section two to a sum of twenty thousand pounds shall, as respects the motor vehicle insurance business, be construed as a reference to a sum of fifteen thousand pounds."

The result of all this is as follows: When the South East Lancashire Insurance Company began to carry on motor vehicle insurance business in addition to its fire business it had to make and did make a deposit of 15,000*l.* with the Accountant-General. By reason, however, of s. 32 (*d*) of the Act of 1909 it was under no obligation to keep a separate fund in respect of the motor insurance business. The deposit accordingly did not form part of any such separate fund, and the provisions of s. 3, sub-s. 2, of the Act of 1909 did not apply to it. Unless, therefore, there is to be found some provision to the contrary in other sections of the Act of 1930 the fund would appear to form part of the general assets of the company and applicable as such in the winding-up of the company. Now it is contended on behalf of the respondents for whom Mr. Harman appears, and the contention has been accepted by Eve J., that such a provision is to be found in s. 43, sub-s. 1, of the Act. The sub-section is in these terms: "No part of any sum deposited by any person with the Accountant-General of the Supreme Court under section thirty-five or section thirty-seven of this Act shall, so long as any liabilities, being such liabilities as are required to be covered by a policy of insurance under this Part of this Act, which have been incurred by him have not been discharged or otherwise provided for, be applicable in discharge of any other liabilities incurred by him."

Can then the deposit in question be said to have been made under s. 35 or s. 37 of the Act? If it was, then the decision of Eve J. was correct, subject only to this, that the liabilities to which preference is given by the sub-section are not all liabilities under the motor vehicle insurance policies, but only those liabilities in respect of risks which the Act requires to be covered by such policies, that is the third party liabilities referred to in s. 36, sub-s. 1 (*b*), of the Act. In this connection, however, it is to be observed, as is pointed out by Maugham

L.J., whose judgment I have had the advantage of reading, that the liabilities which are required by the Act to be covered by the policy of assurance are the liabilities of the assured whereas s. 43 in terms at any rate only refers to the liabilities of the depositor. If, on the other hand, the deposit was not made under either s. 35 or s. 37 of the Act the appellant is entitled to succeed, and it must be declared that the deposit forms part of the general assets of the company available for all its creditors.

In these circumstances it is necessary to consider in some detail the provisions of ss. 35, 36 and 37 of the Act. The first thing to notice about s. 35 is that it does not purport to impose upon any person an obligation to do any particular thing. It merely renders it unlawful for any person to use or cause or permit to be used a motor vehicle on a road unless there is in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of the Act. It is moreover provided by sub-s. 4 that the section shall not apply to vehicles owned by (amongst others) a person who has deposited and keeps deposited with the Accountant-General a sum of 15,000*l.* If therefore a person takes out such a policy or effects such a security as complies with the requirements of the Act or deposits the sum of 15,000*l.* in manner mentioned in sub-s. 4 he does not do so " under " the section in the ordinary sense ; he does so for the purpose of enabling himself to use a motor vehicle on the road without incurring the penalties imposed by the section. In that sense and in that sense only does the person who makes the deposit mentioned in sub-s. 4 make the deposit under the sub-section.

Sect. 36 is concerned solely with the essential qualities that must be possessed by a policy of insurance in order that it may comply with the requirements of the Act and with the liability of the insurers thereunder. It must be a policy which is issued by a person who is an authorized insurer within the meaning of the Act and which, stated shortly, insures against third party risks. Sub-s. 3 provides that the expression " authorised insurer " for the purposes of the

Act means an assurance company or an underwriter in whose case the requirements of the Assurance Companies Act, 1909, as amended by the Act with respect to deposits by assurance companies and deposits and guarantees by underwriters are complied with. It is plain that in this sub-section the words "assurance company" have the same meaning as is given to them in the Act of 1909 and therefore include a person. The reference to an underwriter in the sub-section is due to the fact that by s. 28 of the Act of 1909 it is provided that that Act shall not apply to a member of Lloyd's or of any other association of underwriters approved by the Board of Trade who carries on assurance business provided that he complies with the requirements set forth in the Eighth Schedule to the Act and applicable to business of that class. The provisions of the Eighth Schedule so far as they relate to accident insurance are as follows. Every underwriter is obliged to deposit in such manner as the Board of Trade may direct, a sum of 2000*l.* The sum so deposited is, so long as any liability under any policy issued by the underwriter remains unsatisfied, to be available solely to meet claims under such policies. But in lieu of complying with this requirement the underwriter has the option of complying with the following conditions: All premiums received by or on behalf of the underwriters in respect of accident business carried on by him either alone or in conjunction with any other insurance business for which special requirements are not laid down in the Schedule, are to be placed without any apportionment in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade, and he has to furnish security which may take the form of a deposit or guarantee or partly the one form and partly the other, and such security is to be available solely to meet claims under policies issued by him in connection with accident and any other non-marine business carried on by him for which special requirements are not laid down in the Schedule. The effect, therefore, of s. 42 of the Road Traffic Act, 1930, on the position of an underwriter under the Act of 1909 is that the provisions of the latter Act in reference to motor vehicle insurance will not apply to him so long as he complies with the requirements of the Eighth Schedule as if motor vehicle insurance business were there substituted for accident insurance business. For he is an assurance company within the meaning of the Act of 1909 and accordingly s. 42, sub-s. 2, of the Act of 1930 applies to him. In his case, however, the modifications therein mentioned are inapplicable, as he is altogether outside the provisions of ss. 2, 5, 6 and 32 of the earlier Act. My reason for thus calling attention to the position of an underwriter in so much detail will appear later. Returning now to s. 36, it is to be observed that the section again imposes no liability upon any one to make a deposit. Any one, however, who wishes to qualify as an authorized insurer within the meaning of the section must make a deposit, or in the case of an underwriter make a deposit or give a guarantee. In this sense, but in this sense only, he may be said to make a deposit or give a guarantee under the section.

I must now turn to s. 37, which prescribes the way in which alone the requirements of the Act as to giving a security can be complied with. It merely provides, so far as is material, that the security must be given either by an authorized insurer or by some body of persons which carries on in the United Kingdom the business of giving securities and which has deposited with the Accountant-General the sum of 15,000*l.* in respect of that business. As in the case of the two preceding sections it imposes no obligation on any person to make a deposit. But a body of persons which may desire to be in a position to give securities that satisfy the requirements of the Act must make the deposit therein mentioned. In this sense only can any sum be said to be deposited under the sections.

That brings me once more to s. 43. Now without any question it applies to the deposits of 15,000*l.* mentioned in s. 35, sub-s. 4, and in s. 37, although, as I have already pointed out, such deposits are not in strictness made under the section. If it does not apply to the deposit made by an authorized insurer or an underwriter for the purpose of enabling him to become qualified to issue a policy that will satisfy the requirements of the Act, the victims on the road of persons insured under these policies will not get the protection afforded by the statute to those who are injured or killed by motor drivers who elect themselves to make a deposit such as is mentioned in s. 35, sub-s. 4, or to obtain a security such as is mentioned in s. 37 instead of a policy of insurance. In the case of those insured with an assurance company the claims in respect of third party risks will rank pari passu with other unsecured liabilities of the company, and in the case of those insured with an underwriter such claims will rank merely pari passu with all other claims under the policies issued by the underwriter.

I have struggled to avoid putting a construction upon s. 43 that will have this result—a result that it is difficult to suppose the Legislature intended—but I find myself unable to do so. It is no doubt true that the deposit made by an " authorised insurer " is made for the purpose of enabling persons insured with it to escape the penalties imposed by s. 35 on motor drivers who have neither a policy of insurance nor a security. Such a deposit is in truth made under, that is by virtue of, the Assurance Companies Act, 1909, as amended by the Road Traffic Act, 1930, though in one sense, as I have already pointed out, it can be said to be made " under " s. 36. But it might have been argued that, for the reasons just given, it is as permissible to say that it is made under s. 35 of the latter Act as it is to say that the deposit of 15,000*l.* mentioned in sub-s. 4 is made under that section. As s. 43 stands, however, there are, as it seems to me, fatal objections to the adoption of that argument. In the first place, if the deposit made by an authorized insurer can be said to be made " under " s. 35, the same thing can be said of the deposit made by the body of persons carrying on the business of giving securities. Yet s. 43 refers to deposits made under s. 37 and seems pointedly to omit all reference to deposits made under s. 36. In the next place the claims made in respect of third party risks against an underwriter who has given a guarantee instead of making a deposit cannot in any view of the case be brought within s. 43, and that fact alone makes it difficult to assert with any degree of confidence that the Legislature must have intended the deposits of assurance companies to come within it. In the next place the fact to which Maugham L.J. calls attention that the section only gives priority to such liabilities of the depositor himself as are required to be covered by a policy of insurance, which are liabilities in respect of the death or injury of third parties, makes it difficult to apply the section to deposits made by authorized insurers. But, finally, the provisions of sub-s. 2 of s. 43, to which I have not hitherto referred, seem to conclude the matter. It is as follows: " Any rules made by the Board of Trade under section two of the Assurance Companies Act, 1909, which apply to deposits made by insurers carrying on motor vehicle insurance business shall, with such necessary modifications and adaptations as the Minister, after consultation with the Lord Chancellor, may prescribe, apply to deposits made with the said Accountant-General under the sections aforesaid." This distinction drawn by the sub-section between deposits made by insurers carrying on motor vehicle insurance business and deposits made under ss. 35 and 37 renders it, in my opinion, impossible, especially in view of the other difficulties to which I have referred, to hold that s. 43 applies to the deposit which is the subject-matter of this appeal.

For these reasons I have regretfully come to the conclusion that the appeal succeeds and that it should be declared that the deposit forms part of the general assets of the company available for all its creditors.

Maugham L.J. The question that arises on this appeal is whether the 15,000*l.* deposited by the company under the Assurance Companies Act, 1909, as amended by s. 42 of the Road Traffic Act, 1930, forms part of the general assets of the company applicable in a due course of liquidation, and therefore, subject to the costs of liquidation, must be applied in meeting the claims of general creditors of the company, or whether the same is primarily applicable to the discharge of such liabilities under the company's policies as are required to be covered by policies of insurance under Part II. of the Road Traffic Act, 1930. It was admitted in argument, and as I think rightly, that the question depends upon the true construction of s. 43 of the last mentioned Act. It may be more closely defined as the question whether upon the true construction of that section it applies or extends to sums deposited by a company within the meaning of the Assurance Companies Act, 1909, which carries on motor vehicle insurance business, or whether that section is confined to deposits made by the persons referred to in s. 35, sub-s. 4, of the Act and to deposits made by persons who have given a security in respect of third party risks according to the terms of s. 35, sub-s. 1, of the Act, and the requirements specified in s. 37.

By the Assurance Companies Act, 1909, certain provisions which were previously applicable to companies carrying on life insurance business were extended to other companies (as defined in s. 1) carrying on other classes of business, and in particular fire, accident, and employers' liability insurance. By ss. 2 and 3, which I need not repeat, elaborate provisions were made with reference to deposits which had to be made by every assurance company. These deposits by s. 2, sub-s. 4, were declared to form part of the separate assurance fund required to be kept by s. 3, but only in the case where a company carries on assurance business of more than one class. It should be added that the effect of s. 3 is modified in important respects by ss. 30, 31, 32, 33 and 34 of the Act, and that by s. 28 a number of persons (including members of Lloyd's subject to a certain requirement) are exempted from the application of the Act. Pursuant to s. 2 of that Act as modified by s. 42 of the Road Traffic Act, 1930, the company (whose main business was that of motor vehicle insurance) deposited the sum of 15,000*l.* with the Accountant-General of the Supreme Court. It was admitted that s. 3 of the Act of 1909 does not apply to this company. It should, however, be observed that had it been applicable sub-s. 2 would have applied and the deposit would have been " as absolutely the security of the policy holders " in respect of motor vehicle insurance business " as though it belonged to a company carrying on no other business than assurance business of that class," and would not be liable " for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class." This plainly would not have given to the policy holders of that class a preference on the separate fund (or on the deposit of 15,000*l.*) over the ordinary creditors of the company having claims in connection with that class of business. Nothing in the Act can be held to imply a charge on the fund deposited in favour of the policy holders of the class in respect of which the deposit has to be made. In other words, the effect of s. 3 is only to create a kind of watertight compartment as between the business of the company so far as it consists of carrying on assurance business of a particular class and any other business carried on by the company: (see *Liquidators of the Glasgow Assurance Corporation* v. *Welsh Insurance Corporation* (1); *In re National Standard Life Assurance Corporation.* (2))

Coming now to the Road Traffic Act, 1930, I can see nothing in s. 42 which is intended to suggest that the position of policy holders in respect of motor vehicles is different from that which arises under the prior Act. The section indeed expressly provides that where an assurance company carries on motor vehicle insurance business that Act "shall apply with respect to that business in the same way as it applies to accident insurance business," subject to the specific modifications with reference to the requisite deposit mentioned in sub-clauses (*a*), (*b*) and (*c*) of the section. No doubt the holders of motor vehicle insurance policies have this advantage, that the company which has granted the policies has made a substantial deposit with the Accountant-General of the Supreme Court, and therefore has some financial stability, but to confer a charge in favour of the holders of such policies would I think require definite words aimed at that result. Now s. 43 does confer a species of charge in respect of certain deposits. Sub-s. 1 runs thus: "No part of any sum deposited by any person with the Accountant-General of the Supreme Court under section thirty-five or section thirty-seven of this Act shall, so long as any liabilities, being such liabilities as are

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(2) [1917] 1 Ch. 193.

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required to be covered by a policy of insurance under this Part of this Act, which have been incurred by him have not been discharged or otherwise provided for, be applicable in discharge of any other liabilities incurred by him." The section is expressly confined to deposits described as being made "under section 35 or section 37." It is truly pointed out that "under" in this place must mean "under or by virtue of" or have some such extended meaning; but, so construing the word "under," I am unable to see how the deposit made by a company carrying on motor vehicle insurance business, and therefore making a deposit under the Act of 1909 as amended, can be described as a sum deposited by a person making a deposit under s. 35 or s. 37 of the Act. It is apparent that the position of persons who make a deposit under s. 35, sub-s. 4, of the Act or who give a security involving a deposit in respect of third party risks under s. 37 is very different from the position of an assurance company making a deposit under the Act of 1909. A person who makes a deposit of 15,000*l.* under s. 35, sub-s. 4, is a person to whom s. 35 of the Act of 1930 does not apply at all. He is a person who owns or controls vehicles involved in the accidents. If he or his driver or servant is guilty of negligence causing the death of or bodily injury to third parties he is directly liable to such third parties or their representatives, and in such a case s. 43 is plainly and directly applicable. Again, a person who gives a security and an undertaking in respect of third party risks complying with s. 37 of the Act is a person who could be made liable in respect of any such accident to the persons killed or injured or their representatives and to whom also the words of s. 43 would be quite apposite. An assurance company who makes a deposit in accordance with s. 42, sub-s. 2, is not directly liable under the Act of 1930 to the persons killed or injured by the negligence of the holder of the policy. I am not forgetting s. 10 of the Road Traffic Act, 1934, but that section of course cannot be used to assist in the construction of the Act of 1930. It is the policy holders who have direct claims against the assurance company in respect of accidents which arise through their negligence. Two further points may be mentioned. In the first place s. 43, sub-s. 1, of the Act is worded on the assumption that the person making the deposit can discharge the liabilities incurred by him "required to be covered by a policy of insurance" under the Act, and he is not entitled to discharge "other liabilities incurred by him." But an assurance company is not in a position to discharge liabilities incurred by the assured to persons insured by the negligence of the former, and such liabilities are not liabilities "incurred by him," i.e., on the hypothesis I am testing by the assurance company. The sub-section therefore is not properly applicable to such a company. In the second place the policies are sufficient compliance with the Act, if, being issued by authorized insurers, they give a proper insurance in respect of any liability which may be incurred by the holder in respect of the death of or the bodily injury to any person caused by or arising out of the use of the vehicle on a road; but policies in respect of motor vehicles constantly do cover other risks such as those in respect of injury to the holder of the policy or to his car, and there is no provision for any division or apportionment of claims arising in respect of third party risks and those arising in respect of the usual motor vehicle risks. The deposit made requisite by s. 42 seems to me to enure for the benefit of all policies in respect of motor vehicle insurance business since, as I have pointed out, s. 42, sub-s. 2, provides that the Act of 1909 shall apply with respect to motor vehicle insurance business "in the same way as it applies to accident insurance business," and is not limited in any way to claims under such policies in respect only of third party risks. In these circumstances I see no reason for giving to the language in s. 43 a meaning which the words do not in my opinion naturally bear, for I think the deposit made by an assurance company under the Act of 1909 as amended cannot fairly be described as a sum deposited by a person under s. 35 or s. 37 of the Act of 1930. Other considerations seem to me to point in the same direction. There is the point made by Romer L.J. with regard to the position of underwriters who have given a guarantee instead of making

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a deposit. I think also that the use of the words "deposited by any person" in s. 43 are not words which would have been used by the Legislature if the section was intended to include deposits made by an assurance company as defined in s. 1 of the Act of 1909. Finally it seems to me that sub-s. 2 of the section is at least consistent with the view which I have taken, since the frame of the sub-section seems to distinguish between deposits made by insurers under s. 2 of the Act of 1909 and persons making deposits with the Accountant-General under ss. 35 and 37 of the Road Traffic Act, 1930. For these reasons I am unable to agree with the view expressed by the learned judge as regards the true construction of s. 43, and in my opinion the deposit forms part of the general assets of the company and falls to be dealt with in a due course of the liquidation of the company.

Appeal allowed.

Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux; Stanley & Co.; J. Parker Ayers; Stanley & Co., for J. E. Dell & Loader, Brighton.*

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[1934. S. 298.]

Revenue—Estate Duty—Settlement—Purchase of contingent reversionary life estate—Settlement on discretionary trusts—Falling into possession of life estate—Subsequent death of this tenant for life—Estate duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1.

By two settlements both dated July 26, 1889, certain family estates were settled to the use of A. for life with remainder to the use of B. for life with remainder to the use of the sons of B. successively in tail male with remainder to the use of C. for life with remainder to the use of the sons of C. successively in tail male with remainders over. In 1893 A. purchased C.'s contingent reversionary life estate in the settled estates and by a voluntary settlement dated June 18, 1894, A. conveyed this contingent reversionary life estate to trustees and declared that, if (as happened) C.'s life estate should fall into possession, then, in the event which happened (owing to C.'s being adjudicated a bankrupt on November 15, 1911) of C.'s forfeiting the protected life interest given to him by the voluntary settlement, the trustees should enter into possession or receipt of the income of the settled estates and manage or superintend the management of the same and at their discretion maintain the two mansion houses fit for occupation and pay any annual sums and the interest on any principal sum charged on the settled estates and during the life of C. or such shorter period as the trustees should think fit pay and apply the balance of the income for the maintenance or support or benefit of all or any one of the following persons—namely, C. his wife children or remoter issue (if any) and any other persons for the time being interested in remainder in the settled estates as the trustees should in their discretion think fit and should at such discretion permit all or any of the said persons to occupy all or any of the settled estates and subject thereto should accumulate the balance of the said income; and it was directed that the trustees should hold such accumulations and the investments thereof upon trust as and when they should think fit to realize the said investments or any part thereof and apply the proceeds in or towards the satisfaction of any debts or incumbrances charged upon the settled estates and subject thereto should hold the said accumulations as if they were capital moneys and receivable for the trusts and purposes of one of the 1889 settlements.

B. died on July 2, 1908, and his only son died on June 2, 1910, an infant and unmarried. A. died on March 6, 1915, and C. died on October 4, 1933. Thereupon the settled estate became vested in C.'s eldest son as tenant in tail. The question having arisen whether estate duty was payable in respect of the settled estate on the death of C.:—

Held (affirming Bennett J.'s decision), that the settled estate passed on the death of C. within the meaning of the Finance Act, 1894, s. 1, and therefore that estate duty became payable in respect thereof on C.'s death.

Adamson v. *Attorney-General* [1933] A. C. 257 distinguished.

APPEAL from Bennett J.

By a resettlement dated July 26, 1889 (hereinafter called "the Chelsea resettlement"), the Right Hon. George Henry, fifth Earl Cadogan (hereinafter called "the fifth earl"), and his eldest son, the Hon. Henry Arthur Cadogan (hereinafter called "Viscount Chelsea"), resettled the manor or reputed manor of Chelsea and certain rights of patronage and presentation and certain freehold hereditaments in Middlesex (subject to the life estate of the fifth earl under a settlement dated May 13, 1865, and subject to a term to secure a rent-charge for the wife of the fifth earl and a term to secure portions for his younger children) to the use of the fifth earl during his life in confirmation of his life estate under the earlier settlement and from and after his death to the use of Viscount Chelsea during his life and from and after his death to the use of his sons successively in tail male and in default of such sons to the use of the fifth earl's second son Gerald Oakley (who afterwards became the sixth Earl Cadogan and is hereinafter referred to as "the sixth earl") and his assigns during his life and from and after his decease to the use of his sons successively in tail male with remainders over.

By another resettlement dated July 27, 1889 (hereinafter called "the Culford resettlement"), the estates of the Cadogan family at Culford, Suffolk, were resettled subject to a mortgage therein mentioned upon similar limitations. By a deed of conveyance and assignment dated December 21, 1893, the fifth earl purchased from the sixth earl for 2000*l.* his life estate under the two resettlements in remainder expectant on the death of the fifth earl and expectant on the death of Viscount Chelsea and failure of his issue male. The price was based on a valuation made by an actuary of the said contingent reversionary life interest of the sixth earl.

By a deed of voluntary settlement dated June 18, 1894, the fifth earl conveyed and assigned to trustees the contingent reversionary life interest of the sixth earl in the property comprised in the deed of 1893 and declared that if and so soon as the said estate for life of the sixth earl should fall into possession the trustees should hold the same upon trust that if at the time of such trust taking effect the sixth earl should not be or have been bankrupt and should not have alienated or charged or attempted so to do the life estate in the property thereby conveyed or any part thereof and if no other event should have happened whereby such life estate or any part thereof would if belonging absolutely to him have become vested in or charged in favour of some other person or persons the trustees should allow the sixth earl to enter into and remain in possession or receipt of the income of the said premises during his life on the usual trusts constituting a protected life interest and that in the even of the failure or determination of the said life interest under the trusts aforesaid it was declared that the trustees should after such failure or determination enter into the possession or receipt of such income and manage or superintend the management of the said premises and in their discretion maintain the mansion houses known as Chelsea House and Culford Hall in a proper state for occupation and pay any annual sums and the interest on any principal sums charged on the same premises and should during the remainder of the life of the sixth earl or any shorter period or periods as the trustees should think fit pay or apply the balance of the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons namely the sixth earl his wife (if any) and his children or remoter issue (if any) and the other persons for the time being interested in remainder in the premises thereby conveyed as the trustees should in their absolute discretion think fit as therein mentioned and should during such period and at such discretion as aforesaid permit all or any of the said persons to occupy all or any of the said premises and subject to the said discretionary trust or power should accumulate the surplus of the said income and invest the same and should hold such accumulations and the investments thereof upon trust as and when the trustees should think fit to realize the said investments or any part thereof and apply the proceeds in or towards the satisfaction and discharge of any debts or incumbrances for the time being charged upon or affecting the Cadogan family estates or any part thereof or if there should be no such debts or incumbrances or the same should have been fully paid and satisfied then the trustees should hold the accumulations then made or thereafter to be made as if the same were capital moneys arising under the Settled Land Acts, 1882 to 1890, and receivable for the trusts and purposes of the settlement created by the Chelsea resettlement provided always that in the event of the sixth earl surviving the fifth earl for more than twenty-one years (which event did not happen) the accumulation of surplus income was to cease after the expiration of twenty-one years and the surplus to be thenceforth paid to the person or persons for the time being entitled to the income of the Cadogan family estates under the Chelsea resettlement as if the sixth earl were dead.

Viscount Chelsea died on July 2, 1908, and his only son died on June 2, 1910, an infant and unmarried. The fifth earl died on March 6, 1915, and he was succeeded by the sixth earl, who was married and had issue, and his eldest son the Honourable William Gerald Charles Cadogan, who was born on February 13, 1914, and became on the death of the sixth earl on October 4, 1933, the seventh Earl Cadogan and tenant in tail under the Chelsea and Culford resettlements. The sixth earl had been adjudicated a bankrupt on November 15, 1911, while the fifth earl was still alive, and had never obtained his discharge.

Accordingly on the death of the fifth earl the trustees of the 1894 settlement entered into possession of the income of the estates settled by the Chelsea and Culford resettlements and applied part of the income in accordance with the discretionary trusts contained in the 1894 settlement and accumulated the balance thereof as directed by this settlement. The sixth earl and his family were permitted to occupy Culford Hall and 48 Grosvenor Street, Mayfair, a town house purchased out of the accumulations.

The accumulations of income made by the trustees of the 1894 settlement amounted approximately to the sum of 303,000*l.*, of which the sum of about 138,000*l.* was applied in redemption of charges on the Cadogan family estates.

In these circumstances questions arose whether estate duty was payable on the death of the sixth earl in respect of the property comprised in the Chelsea and Culford resettlements, and on January 25, 1934, the trustees of the two resettlements took out a summons asking (amongst other questions) whether estate duty became payable on the death of the sixth earl in respect of the hereditaments which at the date of the death of the sixth earl were comprised in the two resettlements and the investments and moneys representing at the same date the capital moneys subject to the same resettlements.

Bennett J. said he had come to the conclusion that estate duty was payable on the death of the sixth earl, because the seventh earl then became entitled by force of the limitations contained in the two resettlements to possession of the Chelsea and Suffolk estates.

The argument that no property passed upon the death of the sixth earl rested on the proposition that the effect of the 1894 settlement was that immediately before the sixth earl died there was no beneficial owner of the property other than the remaindermen. That argument was based not upon the decision but upon various observations made in the speeches of the learned Lords in *Adamson* v. *Attorney-General.* (1) He thought *Adamson's* case (1) had nothing to do with the present case. That case related to a settlement of personal property wholly different from the Chelsea and Culford resettlements, and he could not understand how observations made in the course of considering the effect of that instrument could be considered as governing or having any effect on the decision which ought to be come to in this case. From 1889 to 1933 the land at Chelsea and in Suffolk was bound by the limitations and the restrictions imposed upon it by the Chelsea resettlement and the Culford resettlement, except that one of the persons who had an estate for life in those lands had in 1893 sold them to his father, who conveyed that contingent estate in remainder to trustees and laid down the trusts upon which they were to hold that estate if it became an estate in possession. But when once that tenant for life died the trustees had to go out of possession, because at that moment the lands in Chelsea and Suffolk passed under the limitations of the two resettlements to the seventh earl. I think, therefore, that estate duty became payable on the death of the sixth earl, because the lands then "passed" to the seventh earl within the meaning of the Finance Act, 1894, s. 1. That applied not only to the lands but also to the capital moneys subject to both the resettlements.

The trustees appealed. The appeal was heard on November 7, 8 and 9, 1934.

(1) [1933] A. C. 257.

Latter K.C., *Fergus Morton K.C.*, and *Wilfrid Hunt* for the appellants.

Sir Thomas Inskip A.-G. and *J. H. Stamp* for the Crown.

During the argument the following cases were referred to: *Adamson* v. *Attorney-General* (1); *Attorney-General* v. *Lloyds Bank* (2); *Attorney-General* v. *Beech* (3); *Attorney-General* v. *Power* (4); *Attorney-General* v. *Farrell.* (5)

LORD HANWORTH M.R. This appeal raises the question whether estate duty is payable by the seventh Earl Cadogan in respect of the interest which passed or is said to have passed to him upon the death of the sixth earl. Estate duty is imposed by the Finance Act, 1894, and by s. 1 it is provided: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty'." The question we have to determine in the present case is whether there was a "passing" on the death of the sixth earl to the seventh earl so as to bring the interest of the seventh earl within the ambit of this section.

[His Lordship then stated the facts and continued:] Bennett J. has held that there was upon the death of the sixth earl a passing to the seventh earl of an interest which was the subject of taxation under s. 1 of the Act of 1894. It is from that decision that this appeal is brought. In support of this appeal, reference is made, not by way of authority, but by way of illustration, to *Attorney-General* v. *Beech.* (3) It is pointed out that in certain circumstances it is possible that though a death takes place, no interest passes on the death so as to create a liability to estate duty, and by way of illustration Mr. Latter refers to this case, in which a tenant for life of settled property having a power of

(1) [1933] A. C. 257.
(2) (1934) 151 L. T. 268.
(3) [1899] A. C. 53.
(4) [1906] 2 I. R. 272.
(5) [1931] 1 K. B. 81.

appointment appointed the settled property to her son subject to her own life interest, and then by another deed surrendered her life interest to the trustees of the settlement to the intent that the life interest might merge in the interest in remainder of her son. On the death of the tenant for life some years later it was held that the property did not pass on her death so as to be liable to taxation under s. 1, because the estate which had existed in the tenant for life had previously become merged in her son's estate in remainder, with the result that nothing passed to him by reason of the death of his mother. He had already become possessed of the whole interest when the interest of his mother became merged in his interest in remainder. One or two passages in that authority are worth observing at the present time. Lord Halsbury L.C. says (1): "What the statute intended to make liable to pay duty is the succession by one person from another upon death; I do not say necessarily from the person who has died—there may be such a thing of course as a succession by reason of the death of a person not immediately the former owner of the property in popular language, but some death settled between the parties as the period at which the estate should vest"—and he points out that the reason why that interest of the mother escaped duty was that death had nothing to do with it. The moment the conveyance was made by the mother to the son, the son was completely master of the situation and he might have sold the property the very next day. Lord Davey says (2): "It is a complete fallacy, in my opinion, to say that Mr. Beech, the respondent in the present case, was, after he took a surrender of his mother's life interest, the owner of two separate interests. He was the absolute owner of the property, and one cannot be more than the absolute owner of the property. There is no single test of ownership that can be applied to his position at that date which shows that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before Mrs. Beech's death, he remained absolute owner of the property afterwards, and

(1) [1899] A. C. 56.

(2) Ibid. 60, 61.

there was no passing of the estate—that is, no change of ownership by reason of Mrs. Beech's death." Then he adds: "My Lords, this is not a mere technical doctrine—it is the expression of a fact. A man, it may be, had a conveyance from half-a-dozen persons, but from whomsoever he derives his title, however many be the persons who join in conveying to him, if he has got the absolute ownership he is the owner of one estate or interest, namely, the ownership in fee of real estate, or absolute owner of personal estate." I have referred to that case, as Mr. Latter has referred to it, not as being an authority which governs the present case, but as giving an illustration that there are cases in which no liability to estate duty may arise upon a death because there has been no change of ownership upon the death.

Mr. Latter's propositions in regard to this case are as follows: It does not matter under what deed the present possessor holds the property; the tax is on the property that passed, and what has to be considered is whether the beneficial interest in the property settled by the Chelsea settlement before and after the death of the sixth earl was so altered by the death of the sixth earl as to cause that interest to pass on his death. The question may, therefore, be propounded: Has any change taken place in the position or holding of the seventh earl by reason of the death of the sixth earl; was the seventh earl master, in the sense indicated by Lord Halsbury or Lord Davey, before the sixth earl died? It will be observed that the fifth earl when he bought, as he did, the expectant reversionary interest of his second son under the deed of December 21, 1893, did not simply hand over the interest which he had bought to the seventh earl; he settled it and created a protected trust in favour of the sixth earl and a discretionary trust which could benefit other persons, including the wife or children of the sixth earl, with a trust for accumulations. Therefore, at first sight, it would seem that the plain answer to the question, Was the seventh earl master before the sixth earl died? must be in the negative. But it is said that this simple answer overlooks some of the conditions under which there may be such dominion in the seventh earl as in effect to make him the dominant owner and to involve his not having received anything which passed upon the death of the sixth earl. Our attention is drawn, not for the first time, to the case of *Adamson* v. *Attorney-General.* (1) It is said that in *Adamson's* case (1), although something happened upon the relevant death, namely, that a defeasible interest became indefeasible, yet the House of Lords treated that as something which did not alter the true effect of what had already been accomplished by the deed which was in question in that case. It is, to my mind, however, very important, on an examination of *Adamson's* case (1) to bear in mind what happened in the present case. There is no question that the seventh earl succeeded and came into possession as tenant in tail under the resettlement of 1889. It is true that he will also take some portion of the accumulations made by the trustees of the 1894 deed, but he takes his estate by virtue of the resettlement of 1889, and I think it is plain that the deed of 1894 was not made for the purpose of accomplishing, nor did it accomplish, a merger of the interest of the sixth earl in the interest in remainder of the seventh earl. With this in mind, I turn to consider what was decided in *Adamson's* case. (1) I think it is of great importance to see what was the divergence of view of the facts which led to the divergent views on the law. Lord Buckmaster, in dealing with the facts, came to his conclusion in this way. He says (2): " In these circumstances did the property pass on the settlor's death? It is argued on behalf of the trustees that as the property had already passed when the trust was created, all that remained was the power to define certain interests, or, in the absence of direction, their definition by death, but that does not appear to me to conclude the whole matter. Supposing the testator had appointed all the property by will to one child, according to the ordinary meaning of the word that would, I think, involve that all the interests under the settlement had passed to that child at the settlor's death. Before that event there was no interest under the settlement which that or any child could enjoy except the prospect of what might happen when the settlor died "—and later he says (1): "Until that event" —that is the death—" the property was all subject to trusts which might have defeated any individual share." Lord Blanesburgh takes the same view (2): "In effect therefore his interest "—that is the interest of the son—" is contingent on his surviving his father. That is in actual terms the position of each of the three daughters. In one respect only is the son in a less uncertain position than they. The birth of further children to the settlor would have reduced, in its proportion, the contingent share of each daughter. No additions to the settlor's family would affect the amount of the contingent share to be taken by the son "—and again he says (3): "The truth being that, although the title to the entirety was contingently under the deed amongst all the children for the time being alive, no one of them so long as the settlor lived had any right to say that his or her title gave him a right to anything at all." That is the view upon the facts which led to the determination that those two noble Lords reached in point of law. Lord Warrington took a distinctly different view of the facts. He says (4): "The result was that the property itself, both as regards ownership and possession, passed wholly out of the hands of the settlor upon the execution of the deed. It is true he retained some control over both income and capital as to the application thereof respectively for the benefit of the children. His power was, however, strictly limited. He could not lawfully exercise it directly or indirectly for his own benefit. Moreover, the ultimate trust in default of children was not for him but for his next of kin, according to the Statutes of Distribution, who would take as personæ designatæ. It was indeed suggested that there might be a resulting trust for him in the event of all the children dying in his lifetime, and there being under the existing law no person entitled to take by virtue of the ultimate trust. It is, however, by no means clear that in such an event, remote and improbable as it is, there would have been a resulting trust, and the point may, I think, be ignored. In my opinion, under such circumstances, it is correct to say that after the execution of the deed no property remained in the deceased, and, if so, no property passed at his death"—and further on he says (1): "Before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value if any of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing." Lord Russell says (2): "When the settlor died the property did not in my opinion pass either from the settlor or to John. It did not change hands. The effect of the death was not to pass it to John, but to render impossible the happening of any of the events which would deprive him of his interest and make the property pass from him."

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(1) [1933] A. C. 257.

(2) Ibid. 266.

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(1) [1933] A. C. 267.
(2) Ibid. 268.
(3) [1933] A. C. 270.
(4) Ibid. 276.

I have elaborated the view of the facts presented by the noble Lords who came to one conclusion in law and those who came to another conclusion in law for the purpose of seeing how far *Adamson's* case (3) is a guide to us. I think that if we found that the effect of the death of the sixth earl was not to pass anything to the seventh earl, but merely to render impossible the happening of any event which would deprive him of his interest and make the property pass from him—if we found that this was all that happened upon the death of the sixth earl—then I think *Adamson's* case (3) would be a binding authority to which, of course, we must pay due respect and due regard. But when I come back to the facts of the present case and ask myself whether or not before the death of the sixth earl the seventh earl was in the dominant

(1) [1933] A. C. 277.

(2) Ibid. 280.

(3) Ibid. 257.

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position akin to, or analogous to, the position which was occupied by the children in *Adamson's* case (1), I find it impossible to say that there is any analogy between the two cases. It appears to me that the seventh earl took as seventh earl, as the remoter issue that was to take under the settlement, after the death of Viscount Chelsea and the sixth earl. He became the seventh earl with all the consequent results by reason of the resettlement, and what further he may take by reason of the disposition of the fifth earl as to the life estate of the sixth earl under the deed of 1894 does not seem to alter that position. That deed, as I have already said, did not put him unquestionably in control of all that would otherwise have passed on the death of the sixth earl. It gave him an interest, but an interest which only accrued to him after the other trusts provided for in the deed of 1894 had been fulfilled. In these circumstances, it appears to me that neither the illustration given in *Beech's* case (2) nor the authority of *Adamson's* case (1) can be invoked to say that this is a case in which there has been no passing of property upon the death of the sixth earl to the seventh earl. The result is that the appeal must be dismissed.

The question is asked independently on the summons in respect of the Chelsea property and of the Suffolk property, but in effect we must answer both questions in the same way as the learned judge did. The answer must be that estate duty does attach in respect of the property and investments comprised in both the resettlements, including certain chattels which were included in the Chelsea resettlement and in respect of which a specific question was put.

The appeal, therefore, must be dismissed, with costs.

ROMER L.J. I agree. The first proposition on which the appellants found their argument appears to me to be indisputable; it is not, indeed, disputed on the other side. The proposition is that, for the purposes of determining whether, on the death of the sixth earl, the settled properties passed to the seventh earl, we must not look at the Chelsea and

(1) [1933] A. C. 257.

(2) [1899] A. C. 53.

Culford resettlements alone. It is plain that they provide that on the death of the sixth earl, if his estate for life ever becomes an estate in possession, the settled properties shall pass to the person entitled under the next limitation. It does not, however, necessarily follow that, because of that provision in the settlements, estate duty would become leviable on the death of the sixth earl in the event that I have mentioned. It would be necessary to wait and see whether, on the death of the sixth earl, the beneficial enjoyment of the settled estates did in fact pass from him to the person next entitled in remainder. That was established by *Attorney-General* v. *Beech* (1), a case in which, as has already been pointed out by the Master of the Rolls, the tenant for life in possession surrendered her life estate to the person entitled in fee simple in remainder so that the life interest became merged in the fee simple. The result was that, on the death of the tenant for life, no change in beneficial enjoyment took place at all. Before the death of the tenant for life the remainderman had been in possession and enjoyment of the property; he continued in the same possession and enjoyment after the death of the tenant for life. No property therefore passed on the death of the tenant for life. In the present case, if the fifth earl had dealt with the estate of the sixth earl, which he had purchased, by assigning it in such a way that it became merged in the estate tail in remainder of the seventh earl, the reasoning in *Attorney-General* v. *Beech* (1) would have applied, and on the death of the sixth earl nothing would have passed to the seventh earl. But the fifth earl did not deal with the life estate of the sixth earl in that way. What he did was to vest it in trustees upon the trusts which have already been referred to by the Master of the Rolls. It is sufficient to consider what, under those trusts, was the position of the seventh earl after the death of the fifth earl. It was that he was not entitled to enter into possession of or upon the management of the mansion house or any part of the settled estates, nor could he touch a single penny of the income derived from those estates. Pending the remainder of the life of the sixth earl,

(1) [1899] A. C. 53.

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the management and control of the estates were vested in the trustees, and they alone were entitled to receive the rents and profits. For whose benefit were they to be in management and control, and for whose benefit were they to receive the rents and profits? The answer is: For the benefit of all those persons who were objects of the discretionary trust, or, rather, for such of those persons as the trustees might select to be recipients of the rents and profits or part thereof. It was a large and indeterminate class of beneficiaries, indeterminate in the sense that no one could say for certain of any one of them that he was or would be a beneficiary under the trust; but the class, as a whole, constituted, in the sense that I have mentioned, the beneficiaries under that trust. What happened then when the sixth earl died?

The seventh earl became entitled—apart from the fact that he was still an infant—to the management and control, and to receive for his own benefit the rents and profits of the settled estates. In those circumstances one would have thought it was impossible to argue that, on the death of the sixth earl, the estates did not pass to the seventh earl. If it be asked: "From whom did they pass?" that is to say, from whom did the beneficial enjoyment of the estates pass, the answer is: "From that indeterminate class," and none the less because the seventh earl was himself a member of that class.

Then it is said that, whatever one might have thought about it, apart from authority, the Court is precluded from holding that the estate passed on the death of the sixth to the seventh earl because of the decision of the House of Lords in the *Adamson* case. (1) I have had to consider that case on more than one occasion, but it becomes necessary again to consider it and to consider somewhat carefully the facts of that case. The facts were that a man assigned to trustees certain property, and the trustees were to stand possessed of that property, or so much thereof as the settlor did not from time to time appoint in favour of his children, upon trust to deal with the income in

(1) [1933] A. C. 257.

such manner as the settlor should from time to time direct and appoint in favour of all or such one or more as he might select of his children, and in such shares as he might select, and, subject to that power of appointing the income for the benefit of the children, the trustees were to add the income to the corpus of the property, which of course involved an accumulation of income by the trustees. On the death of the settlor the property and accumulations were to be held upon trust as to two-fifths for the eldest son of the settlor and as to three-fifths for such of his other three children as should survive him, with gifts over in the event of any child, including the eldest son, dying before obtaining a vested interest in possession. There was a final gift over, in case all the children died without obtaining a vested interest in possession, in favour of the testator's next of kin. The result was, of course, that during the settlor's life no one could possibly say who ultimately would prove to be the persons entitled to the capital of the trust fund, least of all in what shares those persons would take. It might have been one, it might have been all the children, it might have been none of the children but the next of kin of the settlor ; the class, of course, could not be determined until the death of the settlor. In the meantime, not a single one of those persons, not one of the children and, of course, not one of the possible next of kin, could receive a penny of the income unless, as regards the children, the testator directed the trustees so to pay it ; they had no control over the income or the capital. On the death of the settlor, in the events which happened, the son became entitled to two-fifths of the settled property absolutely, the remaining three children each becoming entitled to one-fifth. In those circumstances, it seemed to this Court and to a minority in the House of Lords that on the death of the settlor the property passed to the four children within the meaning of s. 1 of the Finance Act, 1894. It was, however, held by the majority in the House of Lords that the property did not so pass. The reasons given by the majority in the House of Lords for so holding as reported are not, if I may say so with the greatest respect, easy to understand or follow.

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I think every one of the three learned Lords constituting the majority referred in terms—certainly Lord Warrington and Lord Russell of Killowen did so—to the fact that on the occasion of the making of the settlement all the property of the settlor had passed from him, a fact which, for the purposes of considering whether on his death any property passed, was a wholly irrelevant consideration, because (as has been already pointed out by the Master of the Rolls, reading a passage from the judgment of Lord Halsbury in *Attorney-General* v. *Beech* (1)) it does not matter, for the purposes of s. 1, whether, on the death that is being considered, the property passes from the deceased; the question is whether, on that death, the property passes from one person to another. That must have been known, of course, to the learned Lords, and therefore I think that, when they are referring to the fact that the settlor parted with his whole interest in the property legal and equitable on the occasion of the execution of the settlement, they must have been intending to point out that the whole property passed then to the four children. Of course, in point of fact it did not then do so, because circumstances might subsequently have happened that caused it to pass to the next of kin; but, in the events that subsequently happened, it was true to say that, on the execution of the settlement, the whole beneficial interest of the property passed to the four children although, until the death of the settlor, it was impossible to say whether they ever would become entitled, or, if they did become entitled, in what shares they would become entitled. I think it must have been that consideration which induced the majority in the House of Lords to say that no property passed on the death of the settlor because, if you regarded the circumstances that actually existed at the date of his death, all the property had passed to the beneficiaries when the settlor executed the settlement.

Now let me apply that reasoning, if that was the reasoning of the majority in the House of Lords, to the present case. In the events that happened here, the receipt of the rents and

(1) [1899] A. C. 53.

profits by the trustees was not for the sole benefit of the seventh earl because, during the lifetime of the sixth earl, after the death of the fifth earl, the rents and profits were applied to some extent for the benefit of the persons mentioned as beneficiaries under the discretionary trust. The whole of that income was not so applied ; a certain part of it was left over and was accumulated, and those accumulations were made, in the events which happened, for the benefit of the seventh earl, who was the first tenant in tail and therefore entitled to the income of those accumulations, which were directed by the settlement to be treated as capital money under the settlement. It was for that reason, no doubt, that in this case the Crown did not claim estate duty on the amount of the accumulations, taking the view that, having regard to *Adamson's* case (1), the seventh earl must be deemed to have been in beneficial enjoyment of that fund during the lifetime of the sixth earl. I think that *Adamson's* case (1) really decided that during the lifetime of the settlor in that case, having regard to the events that in fact happened, the four children must be deemed to have been in beneficial enjoyment of the trust property. In the present case, however, it is impossible to say that in view of what in fact happened, the seventh earl can be said to have been in possession of anything beyond the accumulations until the death of the sixth earl.

For these reasons, as well as for those which have already been given by the Master of the Rolls and, indeed, those given by Bennett J., I agree that this appeal fails.

MAUGHAM L.J. I am of the same opinion and for the same reasons, which I will shortly state in my own words. The question before us, in its more limited form, is this : Did the property in question, real and personal, pass on the death of the sixth earl within the meaning of s. 1 of the Finance Act, 1894 ? It may be useful, I think, to bear in mind certain general considerations in approaching the problem. The first is that, beyond all doubt, the word " pass " is not a term of art or a word of any technical meaning ; it is a word

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which, I think, was never used by those eminent masters of real property law who practised as conveyancers in the year 1894. It is certainly a word of very wide meaning as used in the Act; it is obviously not limited to property of the deceased. The definition in s. 22, sub-s. 1 (*l*), of the Act shows that it includes "property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation." That is a definition borrowed in large part from the Succession Duty Act, 1853. The second consideration which is quite obvious is that the Act is only concerned with beneficial interests capable of valuation, since the object of the Act is to levy revenue. Nevertheless and although there is authority in the House of Lords for the view that s. 1 is "comprehensive, broad and clear," the word "pass" is, I think, one which may give difficulty even to a lawyer. The reason is that the word must plainly have a somewhat different meaning if applied to settled property from that which it possesses if the property is unsettled. If one takes a settlement on A. for life and then on B. for life or in tail, B. may have a vested estate for life subject to the preceding life interest, or it may be a contingent estate. In either case, on A.'s death the property passes within s. 1, because it becomes vested in possession. The position would be rather different if A. was the absolute owner of the property and B. inherited his estate. It is clear then that the section is not confined to cases where the interest of the deceased passes, because in the first case the interest of the deceased, being a limited interest, never passes at all; it merely ceases. It was, I think, because of that apparent difficulty in the meaning of the word "pass" that, in the celebrated *Cowley* case (1), the word was explained as meaning "property which changes hands upon the death." That, I think, is the most helpful explanation of the word "pass." It not only must change hands, but the property as a whole must change hands. That was stated by Lord Parker in *Attorney-General* v. *Milne* (2) in a passage which was cited with approval by both Lord Warrington and Lord Russell in

(1) [1899] A. C. 198. (2) [1914] A. C. 765, 779.

the *Adamson* case (1), to which I have to refer in a minute. The fact that the property must change hands as a whole is a reason why a mere change in the legal title of the successor will not be a passing.

Another observation I think may be safely made, namely, that s. 1, as opposed to s. 2, assumes the continued existence of the property after the death on which the duty is to be leviable. It is another way of stating that proposition to say that the property must pass to one or more persons or to a class of persons, if it passes at all. In passing it must change hands. If these considerations are borne in mind, for my part I think there is no great difficulty in stating the grounds of the decision of the majority of the House of Lords in *Adamson's* case. (1) I think what they held was that upon the death of the settlor in that case the beneficial interests in the property did not pass, because the only effect of the death was to render impossible the happening of any of the events which would have deprived the successors—if I may so describe them—of their interests. On that view, the property did not change hands. That, I think, in its simplest form is the result of the decision in *Adamson's* case. (1)

Coming now to the present case, I see no difficulty in reaching the conclusion that the property passed on the death of the sixth earl to the seventh earl in the sense of changing hands on that event. Prior to the death of the sixth earl, the seventh earl had no estate and no interest which could be said to give him a slice of the estate or any interest that could be valued. The property, in my opinion, changed hands as a whole none the less because of the trusts imposed on the rents and profits and interest of the property between March 6, 1915, when the fifth earl died, and October 4, 1933, when the sixth earl died. The proposition contended for in this case, when stated in its simplest form, is that if property is settled on A. for life with remainder upon discretionary trusts for a number of persons during the life of B. with a provision for accumulation of the annual balance, if any, and, if on the death of B. the property is settled on C. for life, or in tail, then on the death

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of B. no property passes. I am unable to see any ground upon which it is possible to reach that conclusion. It seems to me immaterial whether C., in the illustration I have given, is or is not an object of the discretionary trusts. It seems to me also immaterial, when we are considering whether the property, meaning the whole of the property, passes, to take into account the position with regard to any accumulations that may have been made. As has already been pointed out, no question arises in this case as to the accumulations.

The case may, therefore, be still further simplified by suggesting that it is a case in which the property is settled on A. for life and then, upon discretionary trusts, for a class of whom the next taker may or may not be a member, and finally on C. for life on the death of the preceding person during whose life the discretionary trusts were to operate. What is material, in my opinion, is the fact that the discretionary trusts come to a complete end on the death of B. in the illustration I have taken—in this case on the death of the sixth earl. The property then, in my opinion, changes hands as a whole, and the seventh earl, who obviously had no beneficial interest in possession, becomes the owner in tail of the property as a whole.

For those reasons, in addition to those which have already been given, I agree with the judgment of the learned judge below, and the appeal, therefore, must be dismissed.

Appeal dismissed.

Solicitors: *Lee & Pembertons*; *Solicitor of Inland Revenue.*

H. C. G.

In re DICKENS.

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BENNETT J.

June 6, 7; *July* 23.

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Nov. 9, 12, 13; *Dec.* 7.

Copyright—Will—Bequest of "all my private papers whatsoever and wheresoever"—Manuscript of unpublished literary Work—Copyrights bequeathed as part of residue—Proceeds of sale of Copyright divided between specific and residuary legatees—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 17; *s.* 24, *sub-s.* 1; *s.* 31.

C. D., who died in 1870, by his will bequeathed "all my private papers whatsoever and wheresoever" to G. H., who died in 1917, and the residue of his property to his children. Included in the property of the testator was the manuscript of an unpublished work of the testator which was sold and first published in 1934.

On a summons taken out by the plaintiff, who was by devolution the executrix both of the will of C. D. and the will of G. H.:—

Held, by Bennett J. and the Court of Appeal: (1.) that the manuscript was a "private paper" and passed under the gift of "all my private papers" to G. H. (2.) that the gift to G. H. of the manuscript did not operate to give her the copyright in the work but that the proceeds of sale of the copyright fell into the residuary estate of C. D.

But *held* by the Court of Appeal (varying the order of Bennett J.), that while the copyright in the work belonged to the residuary estate of C. D. yet publication was possible only by use of the manuscript and therefore the proceeds of sale of the copyright were payable in moieties to the persons interested under the will of G. H. and the persons interested in the residuary estate of C. D.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the considered judgment of Bennett J.:—

Many years ago Charles Dickens, the celebrated English novelist, composed a literary work descriptive of the life of Jesus Christ. This work was written for the instruction of the author's children and was not intended by him for publication. It was known in the author's family circle as "The Life of Christ" or "The New Testament" or "The Life of Our Lord." The work was not printed in the lifetime of the author. The manuscript of the work in the author's own handwriting was in his possession at the time of his death. There is proof that

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at least one copy of the work was made with the author's permission and given by the author to one of his sons, Charles Dickens the younger. But it is clear on the evidence before me that the work was unpublished by the author during his life and that during his life he was at common law the owner not only of his own manuscript of the work but also of the work itself.

By his will dated May 12, 1867, Charles Dickens, the author, after giving divers pecuniary legacies and a specific legacy, gave to his sister-in-law, Georgina Hogarth, all his private papers whatsoever and wheresoever. He gave divers other specific legacies including a legacy to John Forster of such manuscripts of his published works as might be in his possession at the time of his decease. The testator then disposed of his residuary estate in the following terms: "I devise and bequeath all my real and personal estate (except such as is vested in me as a trustee or mortgagee) unto the said Georgina Hogarth and the said John Forster their heirs executors administrators and assigns respectively upon trust that they the said Georgina Hogarth and John Forster or the survivor of them or the executors or administrators of such survivor do and shall at their his or her uncontrolled and irresponsible direction either proceed to an immediate sale or conversion into money of the said real and personal estate (including my copyrights) or defer and postpone any sale or conversion into money till such time or times as they he or she shall think fit and in the meantime may manage and let the said real and personal estate (including my copyrights) in such manner in all respects as I myself could do if I were living and acting therein it being my intention that the trustees or trustee for the time being of this my will shall have the fullest power over the said real and personal estate which I can give to them him or her And I declare that until the said real and personal estate shall be sold and converted into money the rents and annual income thereof respectively shall be paid and applied to the person or persons in the manner and for the purposes to whom and for which the annual income of the monies to arise from the sale or conversion thereof into money would be

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payable or applicable under this my will in case the same were sold or converted into money And I declare that my real estate shall for the purposes of this my will be considered as converted into personalty upon my decease And I declare that the said trustees or trustee for the time being do and shall with and out of the monies which shall come to their his or her hands under or by virtue of this my will and the trusts thereof pay my just debts funeral and testamentary expenses and legacies And I declare that the said trust funds or so much thereof as shall remain after answering the purposes aforesaid and the annual income thereof shall be in trust for all my children (but subject as to my daughter Mary to the proviso hereinbefore contained) who being a son or sons shall have attained or shall attain the age of twenty one years and being a daughter or daughters shall have attained or shall attain that age or be previously married in equal shares if more than one."

The testator made a codicil on June 2, 1870, to which it is not necessary to refer, and died on June 9, 1870. His said will and codicil were duly proved in the Principal Probate Registry on July 19, 1870, by the said Georgina Hogarth and John Forster. John Forster died on February 1, 1876. Georgina Hogarth died on April 19, 1917.

By her will dated July 25, 1908, the said Georgina Hogarth appointed the late Common Serjeant, Sir Henry Fielding Dickens, her sole executor. Clause 6 of her will is as follows: "I bequeath my manuscript of 'The Cricket on the Hearth' and of 'The New Testament' to my said nephew Henry Fielding Dickens for his life and after his death to his wife Marie Therese Louise Dickens if she survive him for her life and after the death of the survivor of them I give the said manuscripts to the trustees of the British Museum," and she disposed of her residuary estate in the following terms: "I devise and bequeath all the residue of my estate both real and personal whatsoever and wheresoever situate to my executor absolutely And I declare that in making him universal legatee and devisee my object has been to simplify the winding up of my affairs and without in any way derogating from the absolute and unconditional gift made to him or imposing any obligation or responsibility on him I hope that it may be possible for him to carry out the wishes expressed in any memorandum prepared by me or on my behalf that may be found among my papers at my death."

Miss Hogarth made a codicil on October 20, 1915, which contained a recital and direction in the following terms: "Whereas since the date of my said will I have disposed of my manuscript 'The Cricket on the Hearth' now I hereby revoke so much of clause 6 of my said will as deals with the bequest of my manuscript 'The New Testament' after the death of the survivor of my nephew Henry Fielding Dickens and his wife Marie Therese Dickens and in lieu thereof I direct that from and after the death of such survivor the said manuscript shall become the absolute property of the said Henry Fielding Dickens and I make this direction in trust and confidence but without imposing any legal obligation on him so to do (and always subject and without prejudice to the rights of the said Marie Therese Dickens should she survive him) that the said Henry Fielding Dickens will by his will bequeath the said manuscript to such descendant of my late brother-in-law Charles Dickens as he may consider to be most fitted to possess it and in all other respects I confirm my said will." The will and codicil of the said Georgina Hogarth were proved by the late Sir Henry Fielding Dickens on May 5, 1917.

The late Sir Henry Fielding Dickens died on December 21, 1933, having by his will dated March 5, 1930, appointed his wife, the plaintiff, his sole executrix. After giving a pecuniary legacy the will was in these terms: "I give and bequeath to my wife the original manuscript of my father's 'Life of our Lord' which was bequeathed to my aunt Georgina Hogarth in my father's will and given by her to me to hold on the following trusts: Being his son I have felt myself constrained to act upon my father's expressed desire that as it was not intended as a literary effort it should not be published; but I do not think it right that I should bind my children by any such view, especially as I can find no specific injunction against such publication. I therefore direct that my wife and my children should consider this question quite unfettered by any view of mine; and if by a majority they decide that the manuscript should not be published I direct my wife to deposit it with the trustees of the British Museum upon the usual terms; but if they decide by a majority that it should be published then I direct my wife to sell the same in trust to divide the net proceeds of such sale among my wife and all my children in equal shares." The plaintiff proved this will in the Principal Registry on January 18, 1934, and on February 6, 1934, the plaintiff and her six children, being the children of the late Sir Henry Fielding Dickens, entered into a deed of assignment with the Associated Newspapers Limited whereby in consideration of a considerable sum of money named in the assignment the plaintiff, who was described as the executrix and trustee of the late Sir Henry Fielding Dickens and as executrix and trustee of the late Charles Dickens, with the consent of her children assigned unto the Associated Newspapers Limited all the copyright of and in the work in question, including the sole rights in respect thereof mentioned in s. 1, sub-s. 2, of the Copyright Act, 1911, and the sole right to publish the same in any language in all parts of the world.

Hon. Charles Russell for the applicant.

R. P. Croom-Johnson K.C. and *F. E. Skone James* for beneficiaries under the will of Georgina Hogarth. The copyright adheres to the manuscript, i.e., the copyright follows the physical object. That is undoubtedly the position since the Copyright Act of 1911. This manuscript was published after 1911. Since 1911 there has been statutory protection for an unpublished work. [They referred to s. 17 of the Copyright Act, 1911, and to *Macmillan & Co.* v. *Dent.* (1)]

F. R. Evershed K.C. and *E. J. Macgillivray* for the residuary legatees of Charles Dickens. So far as existing rights are concerned they are dealt with by s. 24 of the Act of 1911. Sect. 17 has nothing to do with this case. The common law

(1) [1907] 1 Ch. 107.

right to prevent publication remained in the possession of the legal personal representative of Charles Dickens. That common law right is different from the possession of the manuscript.

The Act of 1911 gave to the person possessing the common law right copyright to the exclusion of the person possessing the manuscript. Therefore the statutory copyright was not possessed by Georgina Hogarth when the Act of 1911 came into force. The mere gift under the will of the manuscript, without more, would not pass the common law right to restrain publication.

Sect. 24 of the Act is a code in itself which deals with existing rights. If a person has a right it is unconditionally preserved by s. 24. There is no answer to the proposition that the Act of 1911 conferred a new right in the place of the previous common law right. The copyright, therefore, belongs to the residuary legatees of Charles Dickens.

Croom-Johnson K.C. in reply.

[They also referred to *Mansell* v. *Valley Printing Co.* (1); *Duke of Queensberry* v. *Shebbeare* (2); *Millar* v. *Taylor* (3); *Macmillan & Co.* v. *Dent* (4); *Falcon* v. *Famous Players Film Co.* (5); and to ss. 11, 17, and 36 of the Copyright Act, 1911.]

Cur. adv. vult.

1934. July 23. BENNETT J. [after stating the facts as above set out, continued:] This originating summons asked "That it may be determined whether upon the true construction of the will of the above named Charles Dickens the manuscript of the work of the said Charles Dickens generally known as 'The Life of Christ' passed to Georgina Hogarth by virtue of the bequest to her contained in the said will of 'all my private papers whatsoever and wheresoever' or whether the same fell into the residuary estate of the said Charles Dickens." Upon that I have already decided that the manuscript passed under the specific bequest of "all my private papers" to

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(1) [1908] 2 Ch. 441, 444.
(2) (1758) 2 Eden, 329.
(3) (1769) 4 Burr. 2303, 2396.
(4) [1907] 1 Ch. 107.
(5) [1926] 2 K. B. 474.

Georgina Hogarth and the question which now has to be dealt with is the question in the form which was stated at the commencement of the proceedings to-day " Whether by virtue of the said bequest or how otherwise the copyright in the said work was vested in the said Georgina Hogarth at the date of her death and whether the proceeds of sale ought to be held on the trusts of her will or whether the same ought to be held upon the trusts applicable to the residuary estate of the said Charles Dickens."

To decide the question as to copyright it is necessary first to consider the law as it stood at the date of the death of Charles Dickens, the author, on June 9, 1870. At that date as regards unpublished literary matter the rights of an author and his personal representatives and of those who became entitled to the unpublished literary matter either upon an intestacy or by virtue of a testamentary disposition rested upon the provisions of the common law. Before July 1, 1912, the date upon which the Copyright Act, 1911, came into operation, there was no statutory copyright in unpublished literary works. Neither the Copyright Act, 1842, nor the earlier Copyright Acts which were thereby repealed, the earliest of which was the 8th Anne, c. 19, protected unpublished literary property. The author's common law rights in such works are stated in the judgment of Lord Mansfield in the well known case of *Millar* v. *Taylor* (1), in the following passage: " It has all along been expressly admitted, 'that, by the common law, an author is entitled to the copy of his own work until it has been once printed and published by his authority'; and 'that the four cases in Chancery, cited for that purpose, are agreeable to the common law; and the relief was properly given, in consequence of the legal right.' The property in the copy, thus abridged, is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever. The property thus abridged is equally incapable of being violated

(1) 4 Burr. 2303, 2396.

by a crime indictable. In like manner, it can only be violated by another's printing without the author's consent: which is a civil injury. The only remedy is the same; by an action upon the case, for damages, or a bill in equity for a specific relief. No action of detinue, trover, or trespass quare vi et armis, can lie; because the copy thus abridged is equally a property in notion, and has no corporeal tangible substance. No disposition, no transfer of paper upon which the composition is written, marked, or impressed, (though it gives the power to print and publish,) can be construed a conveyance of the copy, without the author's express consent 'to print and publish'; much less, against his will. The property of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue for ever; though neither the author nor his representatives should have any manuscript whatsoever of the work, original, duplicate, or transcript." The common law, therefore, had this conception with regard to rights of property in a literary work written, marked or impressed or otherwise recorded upon some material thing namely, that the material thing might, as a subject of property, be separated from the literary work recorded on it and that the literary work might be regarded as an incorporeal subject of property and be owned separately from the material thing upon which it was recorded. With this conception in mind and also Lord Mansfield's statement of the common law that "no disposition, no transfer of paper upon which the composition is written, marked, or impressed, (though it gives the power to print and publish) can be construed a conveyance of the copy, without the author's express consent," the effect of the gift by will of the manuscript of the work in question to Georgina Hogarth on June 9, 1870, the date of the author's death, has to be determined.

The question to be answered is: Did Georgina Hogarth take the two species of property, the physical thing, the manuscript, and also the incorporeal property, the copyright, or did she only take the physical thing, the manuscript? If she took both it could only be, I think, because under the law as it stood in the year 1870 a gift by will of the physical thing would in the absence of words indicating a contrary intention carry with it the ownership of the incorporeal property recorded in it. This is clearly, I think, contrary to Lord Mansfield's view, for the passage I have just read shows that he contemplated the power of a person to print (because he has the manuscript which gives the power) but at the same time the absence of the right to do so. And the passage at the top of p. 2397 where Lord Mansfield is reported as having said that "the property of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue for ever; though neither the author nor his representatives should have any manuscript whatsoever of the work, original duplicate, or transcript" shows that Lord Mansfield did not regard a title to the copy as depending upon the ownership of the manuscript. Upon the authority of Lord Mansfield I hold that by the author's will the gift to Georgina Hogarth of the manuscript of the work in question did not operate to give her the incorporeal property recorded in it, which must therefore have passed to the executors of Charles Dickens' will and have been held by them upon the trusts therein declared of his residue. It must have so passed either because it was personal property not specifically disposed of, or because it was one of the testator's copyrights and so comprised as a result of the express reference to copyrights in the residuary gift.

The next question to be considered is whether the effect of the Copyright Act, 1911, was to give to Georgina Hogarth the beneficial interest in a property she did not possess before that Act came into operation. There is no doubt that the Copyright Act, 1911, did for the first time confer statutory protection upon unpublished literary works. There is no doubt but that from the date when the Copyright Act, 1911, came into operation the common law rights in unpublished literary works were abrogated. Sect. 31 of the Act is plain in its terms. The section reads as follows: "No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions

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of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." But the Act does protect works which were unpublished when the Act came into operation and does so by the joint operation of s. 24, sub-s. 1, and the provisions of the First Schedule. Sect. 24, sub-s. 1, provides: "Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder." In the First Schedule in the first column is the word "copyright," which is the existing right, and in the second column, which is the substituted right, is "copyright as defined by this Act," and then, for the purposes of the Schedule, "copyright" is defined as "in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work."

The difficulty in applying s. 24, sub-s. 1, and the provisions in the First Schedule to the facts of the present case arises from the definition in the Schedule of the meaning in the Schedule of the term "copyright." Strictly speaking I apprehend that the common law conferred no right to restrain publication. The common law conferred a property in something incorporeal—namely, the composition. The power to restrain by injunction publication of a composition was, I apprehend, the equitable remedy for the infringement of the common law right of property. The argument advanced on behalf of those who contended that the statutory copyright in the work in question passed by force of the Copyright Act, 1911, to Georgina Hogarth personally was rested upon the proposition that she could immediately before the commencement of the Act have restrained the publication of the work in question. In certain circumstances I think she could, but not, I think, in all circumstances. For example, if some person had surreptitiously made a copy of the work in question from her manuscript of it and had threatened to multiply and publish copies of the copy so made Georgina Hogarth in her personal capacity might have been able to obtain an injunction to restrain the copyist from carrying the threat into execution. In such a case her right would have had its foundation not in the law of copyright but in her ownership of the manuscript regarded as a chattel. She would not, I think, have had a right to prevent publication of copies of the work made not from her manuscript but from that copy of it given by the testator to his son, Charles Dickens. In the interpretation of s. 24 of the Act and the First Schedule there ought not, in my judgment, to be put upon it a meaning which would have the effect of giving a valuable property to some one who before the Act had no right to it and of taking away that property from some one who had, unless Parliament has used language which makes it clear that such was the intention. The Act should be interpreted, in my judgment, so as to give to those persons who had certain rights of property before the Act the new rights which were being substituted for the old. On that view and ignoring to some extent a literal interpretation of the language of the Schedule, I hold that the phrase in the First Schedule " the right at common law (if any) to restrain publication " means in effect the incorporeal property existing at common law in an unpublished literary composition. On that interpretation there is no difficulty in the application of the language of s. 24 and the First Schedule to the facts of the case. Immediately before the commencement of the Copyright Act, 1911, Georgina Hogarth in her capacity of executrix and trustee of the will of Charles Dickens, the author, was entitled to the incorporeal property in the work in question. The effect of the section was to vest in her in that capacity the copyright as defined by s. 1, sub-s. 2, of the Copyright Act, 1911, in the work in question. On her death it passed to her executor, the late Sir Henry Fielding Dickens, and on his death to the plaintiff, his executrix, who held it upon the trusts of the will of Charles Dickens, the author, as part of his residuary estate. The Act did not, in my judgment, confer any beneficial interest in the statutory copyright upon Georgina Hogarth.

There remains for consideration the argument based on s. 17 of the Copyright Act, 1911. That section reads as follows: "(1.) In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid. (2.) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be prima facie proof of the copyright being with the owner of the manuscript." The argument was that there was prima facie proof that Georgina Hogarth was the owner of the copyright in the work in question, because she was the owner of the author's manuscript and had become the owner thereof under a testamentary disposition made by the author. If Charles Dickens had died after July 1, 1912, this argument might have been sustainable, but as Lindley L.J. pointed out in *Lauri* v. *Renad* (1): "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

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(1) [1892] 3 Ch. 402, 421.

In my judgment s. 17 of the Copyright Act, 1911, ought to be applied only to testamentary dispositions which become effective after July 1, 1912, and not to those which became operative before that date.

The result of the whole matter is that, in my judgment, the question which remains to be answered should be answered by saying that the copyright in the work was vested in Georgina Hogarth at the date of her death but that the same ought to be held upon the trusts applicable to the residuary estate of the first testator, Charles Dickens.

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From that order the children of Sir H. F. Dickens appealed for an order that the copyright in the work passed to Georgina Hogarth as well as the manuscript, and so to Sir H. F. Dickens. A cross-appeal was entered by Ethel Dickens as to the decision that the manuscript passed to Georgina Hogarth.

The appeal and cross-appeal were heard on November 9, 12, 13, 1934.

Croom-Johnson K.C. and *F. E. Skone James* for the appellants. The history of the English law of copyright was discussed in Scrutton on Copyright, 4th ed., p. 35, and it was stated on the authority of *Millar* v. *Taylor* (1) and *Donaldsons* v. *Becket* (2) that at common law there was a right of copyright in the author of a work which continued after publication: see also Scrutton on Copyright, 4th ed., p. 47. In the latter case, however, the common law right after publication was held to have been taken away by the Statute of Anne (8 Anne, c. 19). The view that the common law right had ceased to exist was enforced in *Jefferys* v. *Boosey*. (3) The result is that

(1) 4 Burr. 2303.
(2) (1774) 4 Burr. 2408.
(3) (1854) 4 H. L. C. 815.

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the right of the author to copyright before publication remains unquestioned but that the right to copyright after publication depends on statute. As stated by Lord Brougham in *Jefferys* v. *Boosey* (1): "The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it."

Under the Copyright Act, 1842, s. 3, when an author has died the right of copyright when the book is published goes to the owner of the manuscript: so that if the work had then been published by Miss Hogarth, the copyright would have belonged to her. That would have been the position when once the book was published if the testator had said nothing to prevent Miss Hogarth from getting these rights by possession of the manuscript. It is necessary, however, to consider the whole effect of the will in this case by which Charles Dickens gave Miss Hogarth the manuscript of the work, but gave to John Forster the manuscripts of his published works that were in his possession and included in his gift of residue "my copyrights." It is contended that when the testator talked of "my copyrights" he did not intend to include anything which would pass to Miss Hogarth under the gift of his private papers. In "my copyrights" was included only copyrights of published works other than those given to John Forster. It follows that Miss Hogarth under the Act of 1842 and her successors under the Copyright Act, 1911, ss. 17 and 24, were entitled to the copyright of the particular work when published.

Again, the author or proprietor of an unpublished work has by the common law the right to prevent publication: *Macmillan & Co.* v. *Dent* (2); *Philip* v. *Pennell* (3); *Mansell* v. *Valley Printing Co.* (4) Whatever therefore the result of the will in this case the owner of the manuscript was entitled to prevent publication by any one else under his common law right.

(1) 4 H. L. C. 962.
(2) [1907] 1 Ch. 107.
(3) [1907] 2 Ch. 577.
(4) [1908] 2 Ch. 441.

[ROMER L.J. So also were the residuary legatees under the will.]

That is at most the limit of their power. And s. 17, sub-s. 2, of the Act of 1911 applies and gives copyright prima facie to the owner of an author's manuscript under a testamentary disposition.

Evershed K.C. and *E. J. Macgillivray* for Miss Ethel Dickens. The question in this case is whether by the assignment of February 6, 1934, made by Lady Dickens as executrix of Sir H. F. Dickens and as executrix of Charles Dickens the copyright under the Act of 1911 in the unpublished work passed. For this purpose it is necessary to consider in whom the right is vested under the Act. By the Schedule to the Act of 1911 copyright in a work not published before the commencement of the Act includes "the right at common law (if any) to restrain publication." But it is impossible to say here that Miss Hogarth was a person entitled at common law to restrain publication: see *Macmillan & Co.* v. *Dent* (1) and *Gee* v. *Pritchard.* (2) The common law right will exist separately from the ownership of the manuscript itself.

The questions arising on the will of Charles Dickens are: (1.) Did the manuscript pass by the gift of "private papers"? Assuming it did, did it carry the copyright in the sum of the rights which the author had before publication? The first question is the subject of the cross-appeal in this case. On the second question Bennett J. held that the gift of the private papers on the footing that they included the manuscript, did not pass the copyright. It is said that the words "my copyrights" in the residuary gift do not refer to anything but published works, but the words are wide enough to carry the copyright in unpublished works: see Blackstone's Commentaries, vol. ii., p. 407. (3) In *Lord Perceval* v. *Phipps* (4) the copyright was held as synonymous with the common law right before publication, and therefore it is contended that the word "copyright" in the will included the copyright before publication

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(1) [1907] 1 Ch. 107.

(2) (1818) 2 Swanst. 402.

(3) [Christian's note is still interesting—F. P.]

(4) (1813) 2 Ves. & B. 19.

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and therefore that the words my "copyrights" were wide enough to include the right in respect of the unpublished work.

Further, it is contended that the gift of "private papers" did not include the manuscript in question here. "Private papers" mean papers kept by the testator for their value and special use to him. This document is not a private paper but a manuscript he had written for his children.

The four propositions of law that are established are: (1.) that copyright in an unpublished work is an incorporeal right of property with the incidents of a right of property: *Mansell* v. *Valley Printing Co.* (1); (2.) that its most valuable right is to restrain publication; (3.) that the copyright passed independently of the actual manuscript; (4.) that it had nothing to do with matters of trust and confidence.

In *Caird* v. *Sime* (2) Lord Halsbury accepted the view of Lord Brougham in *Jefferys* v. *Boosey* (3) as to the right of an author before publication.

[LORD HANWORTH M.R. That case seems to suggest that the right passed to Miss Hogarth was to use the manuscript and to make a copy for another but not to publish it.]

The Court will restrain the publication of private letters on the ground of property and not on the ground of breach of confidence: *Earl of Lytton* v. *Devey* (4); *Gee* v. *Pritchard.* (5)

[ROMER L.J. There is a wide difference between giving a manuscript and sending a letter.]

If a person writes a letter although the property in the piece of paper passes to the addressee the writer retains a right to restrain the publication of the letter. The right to restrain publication is something quite apart from the ownership of the manuscript in this case.

[ROMER L.J. What rights do you say Miss Hogarth had over the manuscript?]

She had the rights which any owner of a chattel has over it—namely, to dispose of it, if so minded, and to use it by showing it to friends or reading it. But one thing she cannot do and that is to copy and publish it.

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(1) [1908] 2 Ch. 441.
(2) (1887) 12 App. Cas. 326.
(3) 4 H. L. C. 815, 962.
(4) (1884) 54 L. J. (Ch.) 293.
(5) 2 Swanst. 402.

[ROMER L.J. Surely the beneficiaries of Sir Henry Dickens could have said to the executrix: "The manuscript is ours; you cannot publish without using it, and if you do so you will have to pay us."]

In that case the proceeds of the sale of the copyright would have to be divided between the two groups of claimants, and there is no evidence that any such bargain was made.

The real question is whether Miss Hogarth was the person in whom were vested the rights referred to in the Schedule to the Act of 1911, and it is submitted she was not.

In s. 17 of the Act of 1911 a clear distinction is drawn between the right to the manuscript and the right to restrain publication. The section has no application except to wills coming into force after the passing of the Act. It is perfectly plain that s. 24 applies to this case whatever may be the case as regards s. 17.

Hon. Charles Russell for Lady Dickens.

Skone James replied.

Cur. adv. vult.

1934. Dec. 7. The following judgments were read:—

LORD HANWORTH M.R. A number of interesting points are involved in this appeal, but before discussing them it is important to state the facts with some care. Charles Dickens, the well known novelist and writer, wrote for his children the story of the life of Jesus Christ, which was known in his family as "The Life of Our Lord" or "The New Testament" or "The Life of Christ." He died on June 9, 1870, and at that time this story was in manuscript in his own hand and had never been published. By the terms of his will, which was dated May 12, 1869, he made (inter alia) the following bequest to his sister-in-law, Georgina Hogarth: "I also give to the said Georgina Hogarth all my private papers whatsoever and wheresoever." The will was duly proved, and under the terms of the above bequest Miss Hogarth took possession of the manuscript. By his said will Charles Dickens gave "to

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my dear and trusty friend John Forster . . . . such manuscripts of my published works as may be in my possession at the time of my decease." Thereafter he devised all his real and personal estate to Georgina Hogarth and John Forster, upon trust at their, his or her uncontrolled and irresponsible direction to " proceed to an immediate sale or conversion into money of the said real and personal estate (including my copyrights) or defer and postpone any sale or conversion into money till such time or times as they, he or she shall think fit, and in the meantime may manage and let the said real and personal estate (including my copyrights) in such manner in all respects as I myself could do if I were living and acting therein; it being my intention that the trustees or trustee for the time being of this my will shall have the fullest power over the said real and personal estate which I can give them, him or her." He directed that the residue of his estate and the annual income of it should be held in trust for all his children, and that his daughter Mary, to whom he had previously left an annuity, " as regards my copyrights and the produce and profits thereof," should, notwithstanding the previous provision made for her, share with his other children therein.

Georgina Hogarth died on April 19, 1917, and by her will which was dated July 25, 1908, and a codicil dated October 20, 1915, she bequeathed her manuscript of " The Life of Christ " to Sir Henry Fielding Dickens and his wife for their lives, and upon the death of the survivor of them to Sir Henry Fielding Dickens absolutely. The manuscript thus came into the possession of Sir Henry Fielding Dickens, who was the last surviving son of Charles Dickens and died on December 21, 1933. By his will he explained why the manuscript had never been published while in his possession and left the question of its publication after his death to be decided by a majority of his surviving children.

By a deed of assignment dated February 6, 1934, the widow of Sir Henry Fielding Dickens, with the assent of his surviving children who were parties to the deed, in her capacity as executrix of Sir Henry Fielding Dickens and also as executrix and trustee of the estate of Charles Dickens, sold and assigned the copyright, but not the manuscript, of "The Life of Christ" to the Associated Newspapers, Limited, for a large sum of money. The latter company afterwards published the work in a daily newspaper and have now published it as a book under the title "The Life of Christ" by Charles Dickens.

On March 28, 1934, an originating summons was taken out to have it determined whether the manuscript passed to Georgina Hogarth under the terms of the above recited bequest to her of the "private papers whatsoever and wheresoever" of Charles Dickens; and whether by virtue of that bequest the copyright in "The Life of Christ" was vested in her and ought to be held under the trusts of her will, or whether the copyright fell into and ought to be held under the trusts applicable to the residuary estate of Charles Dickens. The respondents to the summons were the surviving children of Sir Henry Fielding Dickens and Ethel Dickens, who represents those persons who are interested in the residuary estate of Charles Dickens apart from the plaintiff and the children of Sir Henry Fielding Dickens. Bennett J. decided that the property in the manuscript passed to Georgina Hogarth under the bequest to her, and also that the copyright in the work was vested in the plaintiff as the legal personal representative of Charles Dickens and fell into, and was to be dealt with as part of, his residuary estate. From that order the children of Sir Henry Fielding Dickens appeal for an order that the copyright in it passed to Georgina Hogarth as well as the manuscript, and so to Sir Henry Fielding Dickens, and was not part of the residuary estate of Charles Dickens. A cross-appeal was entered as to the decision that the manuscript passed to Georgina Hogarth, but it was not pressed at the hearing of the appeal.

It is necessary, therefore, to consider at the outset what passed to Georgina Hogarth under the bequest of all the testator's private papers. Did that bequest carry with it every right in connection with the manuscript, including the copyright? The terms of the testator's will deal specifically with private papers, with the manuscripts of his published works, and his copyrights. "Private papers" is a term usually employed to connote papers that were not and are not intended for any but a confidential eye. The fact that the manuscripts of his published works are separately and specifically dealt with affords an indication that the testator was fully aware of the distinction between a manuscript and the copyright of the work contained in it. Then his copyrights are referred to more than once as part of his personal property which is to be managed in "such manner in all respects as I myself could do if I were living and acting therein"—that is to say, managed for the benefit and profit of the estate to the advantage of his children. Upon a careful consideration of the terms of the will, I cannot hold that the bequest of the manuscript carried with it the copyright in the work recorded in it.

Next, what is the so-called copyright that remains in an author in respect of an unpublished work, apart from the rights which are secured to him by Statute? With regard to published works, an author's right of copyright is such as the Statute gives him: see *Millar* v. *Taylor* (1) and *Donaldsons* v. *Becket* (2), and see per Lord Watson in *Caird* v. *Sime* (3), and also Scrutton on Copyright, 3rd ed., p. 49. But the question in the present case relates to copyright in an unpublished work. As to that Lord Brougham in *Jefferys* v. *Boosey* (4) said: "The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." This proposition was accepted in *Caird* v.

(1) 4 Burr. 2303.
(2) 4 Burr. 2408.
(3) 12 App. Cas. 326, 343.
(4) 4 H. L. C. 815, 962.

Sime (1) by Lord Halsbury and by Lord Watson (2) in its very terms. In that case the question that was discussed was whether lectures delivered to a class of students was not such a communication of them to the public at large as to deprive their author of his copyright in them, as being unpublished works. There are some words of Lord Halsbury (3) as to the use and meaning of the word " private " which are not irrelevant to the present case. He notes that private letters involve publication of a certain kind to others than the author of them and afford an illustration of a communication which does not involve the infringement of the proprietary right which would be involved in their general publication. It would seem, therefore, that handing over private papers ought not to be taken as connoting the assignment of all rights in connection with them and the abandonment of the proprietary right of copyright by the author. The above principle was followed and applied by Swinfen Eady J., as he then was, in *Mansell* v. *Valley Printing Co.* (4) He says (5) that the right of an author of an unpublished literary production is not confined to the paper or other material on which the work is written. " His right is an exclusive right to publish or refrain from publishing it, as he may please, and any one who publishes it without his consent infringes his legal right, and does that which is actionable per se." In the Court of Appeal (6) this decision was affirmed; Lord Cozens-Hardy M.R., quoting the passages already referred to from *Caird* v. *Sime* (7), stated that the law thus laid down is based upon property irrespective of implied contract or breach of duty; and Farwell L.J., examining the nature and extent of an author's right at common law before publication, apart from any title to the corporeal paper on which the work is written, gives his opinion that " it is an incorporeal right of property giving to the author the fullest rights not only of exclusion, but also of actual enjoyment so far as they are compatible with non-publication." See also *Lord Perceval* v. *Phipps* (1) and *Gee* v. *Pritchard.* (2)

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(1) 12 App. Cas. 326, 337.
(2) Ibid. 344.
(3) Ibid. 337.
(4) [1908] 1 Ch. 567.
(5) Ibid. 573.
(6) [1908] 2 Ch. 441.
(7) 12 App. Cas. 326, 337, 343, 344.

From the above authorities it appears clear that an author's incorporeal copyright in an unpublished work does not necessarily pass with the corporeal paper but remains in him. In view of the interpretation which I have put upon the terms of Charles Dickens' will, it would seem, therefore, that, while the original manuscript passed to Georgina Hogarth and so to Sir Henry Fielding Dickens, the right—copyright—to restrain unauthorized publication remained in Charles Dickens' personal representatives and is a part of his residuary estate.

It is now necessary to consider the effect of the Copyright Acts. By the Statute of Anne (8 Anne, c. 19) a statutory term of twenty-one years was given to the copyright of printed and published works, and authors of works not printed or published were given a term of fourteen years from the date of publication. The Copyright Act, 1842, repealed the Statute of Anne and fixed the span of the copyright in published works as the natural life of the author and a further term of seven years from his death, in all not less than forty-two years. By s. 3 copyright in any work published after the death of the author was to endure for the term of forty-two years from its publication, and "shall be the property of the proprietor of the author's manuscript from which such book shall be first published." The appellants claim that this section governs their rights and awards them the copyright as the owners of the manuscript, for it was operative at the date of the death of Charles Dickens. They claim that 1870 is the date relevant to the bequest and transfer of the manuscript and the copyright which was thus by the Statute of 1842 attached to it.

The Copyright Act, 1911, did not come into force until July 1, 1912; but the appellants rely, if it is necessary for them to do so (which they do not admit), upon s. 17, sub-s. 2, of that Act, which provides that the ownership of an author's manuscript after his death, where such ownership has been

(1) 2 Ves. & B. 19, 27.

(2) 2 Swanst. 402.

acquired under a testamentary disposition made by the author and has not been published, shall be prima facie proof of the copyright being with the owner of the manuscript. In my judgment, the Copyright Act, 1911, does apply to the present case and is retrospective in its operation to determine the rights of the parties. No doubt it is a fundamental rule of our law that no statute shall be construed so as to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. That rule particularly applies when the new statute would prejudicially affect existing rights or impair contracts. But the Copyright Act, 1911, is beneficial and not prejudicial to existing rights. It gives a longer term of copyright than was secured to authors previously—namely the life of the author and fifty years after his death, as contrasted with the natural life of the author and seven years more, or a total of forty-two years in all, under the Act of 1842. The terms of the later Act are specific and peremptory. Sect. 31 declares that no person shall be entitled to copyright in any literary work, whether published or unpublished, " otherwise than under and in accordance with the provisions of this Act." The Copyright Act of 1842 is repealed wholly. By s. 24 existing rights are specifically dealt with and replaced by substituted rights. Sect. 17 deals with the posthumous work of an author " which has not been published." Sect. 32 provides for making Orders in Council under the Act and is at once operative, but expressly saves rights and interests acquired or accrued and requires the Order to provide for the protection of such rights and interests which might not be preserved otherwise. Under s. 33 the copyright given to the Universities and Colleges under the Copyright Act, 1775, is expressly saved, but the sanctions and remedies applicable are to be under the later Act and no longer under the original Act. In all, therefore, in my opinion, the Act of 1911 now governs all questions of copyright. This view seems to be that held by Scrutton L.J.: see his judgment in *Falcon* v. *Famous Players Film Co.* (1)

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(1) [1926] 2 K. B. 474.

In this view of the Act, the terms of s. 17 must be taken to have replaced those of s. 3 of the Act of 1842 quoted above. Sect. 17, sub-s. 2, declares that the ownership of the author's manuscript after his death shall be prima facie proof of the copyright being with the owner of the manuscript—not more. But where, as in this case, it is held that the author did deal with this copyright among his others and bequeath it as part of his residuary estate, that prima facie proof is displaced and the ownership of it passes in accordance with the directions given by the testator.

There remains the question whether the purchase price paid is to be attributed wholly to the copyright—a matter which has been discussed in this Court but was not brought to the attention of Bennett J. By clause 2 of the deed of assignment the right to the manuscript was expressly reserved to the vendor and the children. By clause 3 the vendor was to supply a copy of the work to the purchasers, and the latter were to have a right to inspect the original and to compare the copy with it. The trustees of the residuary estate of Charles Dickens, to which the copyright in the work belonged, could not have realized that copyright without reference to the original manuscript. It is noticeable that the vendor under the assignment is expressed to sell as executrix of Sir Henry Fielding Dickens and as trustee of the estate of Charles Dickens. It was necessary that those two capacities should be brought into action if any such result as was effected by the assignment was to be accomplished. It seems inequitable to attribute the whole of the purchase money to the action of the vendor as trustee, and in no wise as executrix of her late husband.

What is to be the measure and value of the action of the trustee as severed from that of the executrix? In the absence of any evidence which would lead to any other result, it would be fair and equitable to divide the purchase money into two moieties and to attribute one to each capacity under which the vendor was enabled to sell and to receive the purchase price.

Under these circumstances, the Court will vary the order made by Bennett J. and declare that the proceeds of the assignment of the copyright in "The Life of Christ" ought to be held as to one moiety upon the trusts applicable to the residuary estate of the testator Charles Dickens and as to the other moiety upon the trusts applicable to it under the will of the late Sir Henry Fielding Dickens.

This Court will make the same order as to the costs of all parties to the appeal as was made in the Court below.

There will have to be some slight alteration of the terms of that order as to costs, which I will deal with when my learned brethren have given their judgments.

ROMER L.J. The first question to be determined upon this appeal is whether upon the true construction of the will of Charles Dickens the manuscript of "The Life of Christ" passed to Georgina Hogarth by virtue of the bequest to her of all the testator's private papers whatsoever and wheresoever. Bennett J. answered this question in the affirmative, and in my opinion he was plainly right in so doing. The manuscript was written by Charles Dickens for the benefit of his children and with no thought of its ever being published to the world. It had not even a title, "The Life of Christ" being merely one of several names by which it was known in the family. The manuscript remained in his possession until his death, though he caused a few copies of it to be made by Miss Georgina Hogarth. But these copies, except for one that was given to a friend of the family, were given exclusively to his sons or some of them. In these circumstances it seems clear that the manuscript was one of Charles Dickens' private papers. The cross-appeal on this point must, therefore, be dismissed.

The next question is whether there passed to Georgina Hogarth, together with the manuscript, what has been called the common law "copyright" in the work, that is to say, the sole right of first printing and publishing the same for sale. That such a right was vested in Dickens at the date of his death is clearly established by numerous authorities of which it is sufficient to mention *Millar* v. *Taylor*. (1) It was indeed

(1) 4 Burr. 2303.

said by Wightman J. in *Jefferys* v. *Boosey* (1) that so far as he was aware there had never been any decision to the contrary. Whether at common law the sole right of making copies ever survived publication, and whether, even if it did, the common law right did not become extinguished by statutory copyright where that existed, were questions that gave rise to much conflict of judicial opinion. But there is no doubt that in the case of an unpublished literary work the author and those claiming through him had the sole right of publication. In cases where the author himself retains possession of the manuscript, it matters not whether this right flows from such possession or from a right in the literary composition apart from and independent of such possession. But the question is one of vital importance where the manuscript is in the possession of some person other than the author. This, of course, usually happens in the case of letters. The manuscript is in the physical possession of the recipient of the letter. It has nevertheless been established by numerous authorities that the writer of the letters may restrain publication. This right exists quite independently of there being any such breach of trust or confidence in making the publication as would induce a Court of equity to interfere. The publication is a breach of a common law right. In *Millar* v. *Taylor* (2) Willes J. said this in speaking of the manuscript of a literary work: "Suppose the original, or a transcript, was given or lent to a man to read, for his own use; and he publishes it; it would be a violation of the author's *common law right to the copy*. This never was doubted; and has often been determined." He then referred to four cases in Chancery that had been cited in argument which included that of *Pope* v. *Curl*. (3) Speaking of this case Willes J. said (2): "Lord Hardwicke thought, 'sending a letter transferred the *paper* upon which it was wrote, and *every use* of the contents, *except* the *liberty* and *profit* of *publishing*.' When *express consent* is not proved, the *negative is implied* as a tacit condition." The observations made by Lord Mansfield in delivering judgment in the same case are of the greatest importance as they are of the highest authority (1): " From premisses either expressly admitted, or which cannot and therefore never have been denied, conclusions follow, in my apprehension, decisive upon all the objections raised to the property of an author, in the copy of his own work, by the common law. I use the word ' copy,' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters. It has all along been expressly admitted ' that by the common law an author is entitled to the copy of his own work until it has been once printed and published by his authority,' and ' that the four cases in Chancery, cited for that purpose, are agreeable to the common law; and the relief was properly given, in consequence of the legal right.' The property in the copy, thus abridged, is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever," and he added a little later: " No disposition, no transfer of paper upon which the composition is written, marked, or impressed, (though it gives the power to print and publish) can be construed a conveyance of the copy without the author's express consent ' to print and publish '; much less against his will. The property of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue for ever: though neither the author nor his representatives should have any manuscript whatsoever of the work, original duplicate, or transcript." (2) It is plain that the words " though it gives the power to print and publish " in this passage means " though it gives the opportunity to print and publish."

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(1) 4 H. L. C. 815, 888.

(2) 4 Burr. 2303, 2330.

(3) (1741) 2 Atk. 342.

These observations of Willes J. and Lord Mansfield have not, so far as I am aware, ever been questioned in any later case. There is no doubt a passage in the speech of Lord Brougham in *Jefferys* v. *Boosey* (1) which seems at first sight to indicate his opinion that, if an author desires to prevent a person to whom he has given or lent his manuscript, from publishing the contents to the world, he must impose an express condition to that effect, differing in this respect from the opinions of both Lord Mansfield and Willes J. But Lord Brougham was merely concerned with showing that the author's common law right did not survive publication and he ought not, I think, to be regarded as having laid it down that, where an author gives or lends his manuscript to a person, there is not in general implied a condition that the manuscript shall not be used to defeat that common law right of the author to what Lord Mansfield called his "copy." It was held in *Millar* v. *Taylor* (2) that copy exists as an incorporeal right independently of the manuscript and I can find nothing in Lord Brougham's speech that indicates his disagreement with this view. But, if this be so, it is difficult to see why the copy should pass with a gift of the manuscript unless it is in terms expressly made to do so. Confirmation of this view seems to me to be afforded by *Caird* v. *Sime* (3), in which the right of a professor to restrain the publication of lectures delivered by him in his class room was upheld by the House of Lords. In that case Lord Watson said (4): "The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public." If such consent is not to be implied by the delivery of a lecture in a class room I cannot see why it should be implied by the delivery of the manuscript of a literary composition to some friend or acquaintance of the author. As Lord Halsbury L.C. said in the same case (5): "It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It

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(1) 4 Burr. 2303, 2396.

(2) [The original report is garnished with an enormous number of italics of no rational significance, merely annoying to a modern reader.—F. P.]

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(1) 4 H. L. C. 815, 963.
(2) 4 Burr. 2303.
(3) 12 App. Cas. 326.
(4) Ibid. 343.
(5) Ibid. 337.

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is further incapable of denial that that proprietary right may still continue notwithstanding some kind of communication to others." In *Mansell* v. *Valley Printing Co.* (1) Cozens-Hardy M.R., after quoting these two passages from the speeches of Lord Halsbury and Lord Watson, said : "The law thus laid down is based upon property, irrespective of implied contract or breach of duty. It does not depend upon property in the paper or MS. It is an incorporeal property." In the same case Farwell L.J. said (2) : " The only question is what is the extent and nature of an author's right at common law in his own work before publication, apart from any title to the corporeal paper or canvas on which it is written or delineated. I am of opinion that it is an incorporeal right of property giving to the author the fullest rights not only of exclusion, but also of actual enjoyment so far as they are compatible with non-publication." Fletcher Moulton L.J. said much to the same effect in *Macmillan & Co.* v. *Dent* (3) : " Now it is beyond question that the common law recognized in an author a property in his composition so long as he kept it to himself. But that property was lost by publication. It was not necessarily lost by communication. He might hand the manuscript of his composition to a friend confidentially, or he might even give the manuscript to a friend without the transaction having any confidential character, and the law did not hold that by doing so he must necessarily have denuded himself of his property in the literary composition itself. It thus contemplated a property in a composition independently of the property in the manuscript in which that composition was to be found."

In view of these authorities I am of opinion that the bequest to Miss Georgina Hogarth of the manuscript of " The Life of Christ " did not pass to her the incorporeal right of Charles Dickens in the composition. That right would, therefore, have passed under the gift in his will of his residuary estate even though such estate had been referred to merely in general terms. In point of fact, however, the will expressly refers to the testator's "copyrights" as being comprised in his residue, and there can be no doubt that that word is, at any rate, capable of including an author's rights at common law before publication: see the observations of Maule J. and Parke B. in *Jefferys* v. *Boosey*. (1) See too the Copyright Act, 1842, s. 2, where the word "copyright" is used as including the rights of an author before publication. But though the testator's common law right, whatever may have been the correct description of it at the date of his will, did not pass to Miss Hogarth, the bequest of the manuscript to her undoubtedly put her in a position of exercising a large measure of control over the publication of its contents. For the common law right of publication that passed to the residuary legatees could not have been exercised at all if the manuscript had been the only copy of the work in existence. Miss Hogarth could not have been compelled to part with the manuscript or to allow it to be copied, and had any one copied it without her consent she could have restrained any publication being made by means of such copy. Nor would the existence of the copies that had been made by her at Charles Dickens' direction have seriously weakened her position in this respect. They were not in his handwriting, and it is difficult to suppose that any one would have been willing to publish from those copies without comparing them with the original or obtaining some evidence of their accuracy—evidence which Miss Hogarth could alone have given. In addition to all this she had been placed in a dominating position by the Copyright Act, 1842, for by s. 3 of that Act the statutory copyright in every book published after the death of its author was vested in the proprietor of the author's manuscript from which such book should be first published and his assigns. It seems at first sight somewhat strange that the copyright should not have vested in the author and his assigns by virtue of his common law right. But it has been judicially determined that the section means what it says: see *Macmillan & Co.* v. *Dent*. (2) I need not pause to consider whether any of the copies made by Miss Hogarth could properly be described as being the author's manuscript within the meaning of the section. Miss Hogarth would, I think, have been sufficiently protected by the doubt on the point that must have been engendered in the mind of any intending publisher.

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(1) [1908] 2 Ch. 441, 445.

(2) Ibid. 447.

(3) [1907] 1 Ch. 107, 120.

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(1) 4 H. L. C. 815, 893, 919.

(2) [1907] 1 Ch. 107.

Such were the relative positions of Miss Hogarth on the one hand and the residuary legatees and those claiming under them on the other hand at the time that the Copyright Act, 1911, came into force. That Act for the first time gave statutory copyright to the author of an unpublished work, and it was defined as meaning in reference to such a work the sole right to publish the work or any substantial part of it. The case of works already in existence was dealt with by s. 24. Reading that section and the First Schedule together it was provided (so far as is material) that where any person was immediately before the commencement of the Act entitled to copyright in any literary work or to any interest in such right he should as from that date be entitled to copyright as defined by the Act. Now the Schedule contains this important provision : " For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings :—' Copyright,' in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work." If I am right as to the respective positions of the parties at the date that the Act came into force the effect of it seems quite plain. As from that date the statutory copyright in " The Life of Christ " vested in the legal personal representatives of Charles Dickens as part of his residuary estate, for they alone had the right at common law to restrain the publication or other dealing with the work. Miss Hogarth possessed no right. She was, as I have already pointed out, in a position in which she could in effect have prevented publication. But it is impossible to say that she had a common law right so to do.

It was argued on behalf of those who are now claiming under her that the ownership of the copyright in question

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must nevertheless be taken to be vested in them by virtue of s. 17, sub-s. 2, of the Act. That sub-section is as follows: " The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be prima facie proof of the copyright being with the owner of the manuscript." Bennett J. was of opinion that this sub-section only applies to cases of death after the Act came into operation. He thought that to hold otherwise would be to give to the Act a retrospective operation that was not warranted in the circumstances. With all respect to him I do not share this view. The sub-section merely provides a rule of procedure for all future proceedings and would not affect proceedings already pending. But I can see no reason why, when applied to future proceedings, the rule should be confined to deaths occurring after the Act comes into force. To apply it to deaths occurring before the Act is not in truth to give the sub-section a retrospective effect at all. But though I think that the sub-section is applicable to the present case it does not, in my opinion, help the appellants, for the ownership of the manuscript in the circumstances mentioned in the sub-section is only prima facie evidence of ownership of the copyright, and does not attract the copyright where the facts are known, and those facts, as in the present case, show that the ownership is in some person other than the owner of the manuscript.

For these reasons, which are in substance those given by Bennett J., the learned judge, in my opinion, came to a right conclusion in holding that the copyright in " The Life of Christ," at the date of the assignment of February 6, 1934, was vested in the plaintiff as the legal personal representative of Charles Dickens. It follows that the proceeds of sale of the copyright must be held upon the trusts applicable to the residuary estate of Charles Dickens, and the order made by the learned judge so declares. Now the parties to the action appear to have regarded this as decisive of the ownership of the whole proceeds of sale received by Lady Dickens as consideration for the assignment of February 6, 1934. But, in my opinion, this is not so. It is true that such assignment contains a recital to the effect that an agreement had been come to for the sale of the copyright for the sum therein mentioned, and this was the only consideration received by Lady Dickens. An examination of the document, however, makes it plain that the consideration was paid for something in addition to the copyright. Lady Dickens joined in the assignment not only as legal personal representative of Charles Dickens, but also as executrix of Sir Henry Dickens to whom the manuscript had passed under Miss Hogarth's will and codicil for an absolute interest subject only to the life interest of Lady Dickens. Such absolute interest had been bequeathed to Lady Dickens under Sir Henry Dickens' will without any reference to her life interest upon trust in the event of publication to sell the manuscript and divide the proceeds of sale between his wife and all his children in equal shares. By clause 1 of the assignment Lady Dickens assigned to the purchaser the copyright in the work. By clause 2 the right to the possession or ownership of the manuscript and the right of selling or otherwise disposing of it are expressly excluded from the sale, but clause 3 is in the words following: "The vendor shall within seven days of the date hereof supply to the purchasers a true copy of the said work and shall (if the purchasers desire) permit some authorised representative of the purchasers at any time within seven days after the delivery to them of the said copy to inspect the original manuscript of the said work for the purpose of comparing it with such copy and to photograph the said original manuscript and to reproduce the same." Clause 4 contains certain covenants and guarantees by Lady Dickens and her surviving children in relation to the manuscript to which the purchasers presumably attached some importance. It is obvious, therefore, that the consideration was paid for something beyond the mere copyright. It was also paid for the right to use and inspect the manuscript in the way set out in clause 3, and for the purpose of circumscribing the full use of it by its owners to the extent mentioned in clause 4 (*b*). The sale of the copyright could not, indeed, have been effected at all had Lady Dickens been merely the legal personal representative of Charles Dickens and not also the owner of the manuscript. If one person had been the owner of the copyright and another the owner of the manuscript, neither one singly could have conferred upon the purchasers the rights conferred by the deed of assignment. The copyright was practically worthless if the purchaser could not make use of the manuscript. The right to examine and copy and photograph the manuscript was practically worthless if the purchaser could not obtain the copyright. The concurrence of both owners in the sale could alone have resulted in the payment of a substantial sum, and in the circumstances it seems reasonably clear that neither owner would join in the sale except on the terms that such sum should be equally divided between them. This much, at any rate, is clear. If the legal personal representative of the owner of the copyright had been proposing to sell the copyright for a large sum, and the legal personal representative of the owner of the manuscript, being the same person, was about to join in the sale without receiving any consideration for so doing, the persons beneficially interested in the manuscript could have restrained him from so doing, and the leave of the Court to his concurrence in the sale would only have been given on the terms of the estate of the owner of the manuscript receiving a substantial portion of the purchase money. In the present case the sale has been completed by Lady Dickens in both capacities without any directions being asked for or obtained from the Court. Both sets of beneficiaries are, however, represented before the Court, and the question as to how the purchase money received by Lady Dickens is to be applied as between them must be decided. Bennett J.'s attention was not called to this point and, therefore, we have not the advantage of knowing what his opinion on the matter would have been. In these circumstances it seems to me that the right course to pursue in a Court administering rules of Equity is to decide in favour of equality and to declare that one-half of the net consideration received by Lady Dickens is to be held upon the trusts affecting the residue of the estate of Charles Dickens and that the other half is to be treated as though it were proceeds of sale of the manuscript and held upon the trusts declared in the will of Sir Henry Dickens concerning such proceeds, assuming as I do that Lady Dickens elects to take under that will.

MAUGHAM L.J. At the outset of the present inquiry there are two questions of construction which arise on the will of Charles Dickens, the celebrated novelist, who died some sixty-four years ago. He bequeathed to his sister-in-law, Georgina Hogarth, " all his private papers whatsoever and wheresoever," and the first question is whether there is included in this bequest the manuscript of an unpublished work, being an account of the Life of Christ. This work was written by the author not for publication but for the benefit of his family, and he retained it for their private study. It may be interesting to note that Charles Dickens referred to it in one of his last letters he ever wrote, dated June 8, 1870 (quoted in Forster's Life), as a life written for his children. Some copies were made with the author's permission, one, for instance, for his eldest son, Charles Dickens the younger; but the work was unpublished in the author's lifetime and was not intended for publication. In these circumstances, I am of opinion that, like letters, diaries and memoranda, it comes fairly within the description of private papers. The manuscript, that is the pieces of paper with the writing on them, therefore passed on the death of the author to Miss Hogarth.

The next question is whether both the right to publish the said work and the statutory copyright, that is, the right after publication conferred by the Copyright Act, 1842 (5 & 6 Vict. c. 45), passed under the will to Miss Hogarth or passed under the gift of residue (which expressly included the testator's " copyrights ") to Miss Hogarth and John Forster upon the trusts mentioned in the will. These two rights are very different. The latter is purely statutory and depended (in 1870) solely on the Copyright Act, 1842 (three previous Acts, including the well known Statute of Anne, having been repealed). It was a right dependent on publication in the United Kingdom, by a British subject or an alien friend resident in British dominions, of a book not previously published. It endured for a term of years which, in the case of a posthumous publication, was to last for forty-two years from the first publication. The concluding words of s. 3, which defines the term, are at first sight puzzling: "The copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, *and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.*" The words which I have italicized were much considered by the Court of Appeal in *Macmillan & Co.* v. *Dent* (1), a decision by which we are bound. Taking the words literally, as that decision requires us to do, they might perhaps have afforded a very simple answer to the present question but for the circumstance that the book was not published by the proprietor of the manuscript before the repeal of the Act of 1842 by the Copyright Act, 1911. In my opinion, however, s. 3 of the Act of 1842 assumes a lawful publication by the proprietor of the author's manuscript, and, as will be seen, it is not every proprietor who is entitled to publish the work. It may be noted that the Act says nothing about works of an immoral, seditious or blasphemous nature, but the Courts have always held that they are not entitled to copyright under the Act because the author had no right to publish them.

The common law right of the author and his assigns to restrain publication has been discussed with much learning and ingenuity both in text-books and in some celebrated decisions, in particular, in *Millar* v. *Taylor* (2); *Donaldsons* v. *Becket* (3); *Prince Albert* v. *Strange* (4); and *Jefferys* v. *Boosey*. (5) It is now beyond dispute, if ever it was really in doubt, that prior to the Copyright Act, 1911, an author had at common law the sole right of first printing and publishing his book for sale and might bring an action against any person who printed, published or sold the same without his consent; and since the great case of *Jefferys* v. *Boosey* (1) it has also been clear that the common law right came to an end on any lawful publication within the United Kingdom. The author's right before publication was affirmed by ten judges out of the eleven who gave their opinions, and Lord Mansfield was known to have been in accord with their view. Lords Cranworth, Brougham and St. Leonards also agreed, and Lord Brougham, though he like the other Lords thought that the right must come to an end on publication, expressly stated in his speech: "The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied." This view was also taken in the House of Lords in *Caird* v. *Sime* (2), and was, of course, followed by the Court of Appeal in *Mansell* v. *Valley Printing Co.* (3) The right was not a mere right to the paper on which (in the case of a book) the work was written. It was, as Lord Mansfield said in *Millar* v. *Taylor* (4), an incorporeal right "equally detached from the manuscript, or any other physical existence whatsoever." He added that "no disposition, no transfer of paper upon which the composition is written, marked or impressed (though it gives the *power* to print and publish) can be construed a conveyance of the copy without the author's express consent 'to print and publish'; much less, against his will." It may be mentioned that Yates J. (the judge who had the courage to dissent, that being the first time since Lord Mansfield sat in the Court that there was any final difference of opinion) did not disagree on this matter, but only on the effect of publication. The same view as to the nature of the right was expressed by Swinfen Eady J. and the Court of Appeal in *Mansell* v. *Valley Printing Co.* (5), and it cannot now be open to question. I may observe in passing that

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(1) [1907] 1 Ch. 107.

(2) 4 Burr. 2303.

(3) 4 Burr. 2408.

(4) (1849) 1 Mac. & G. 25.

(5) 4 H. L. C. 815, 962.

(1) 4 H. L. C. 815, 962.

(2) 12 App. Cas. 326, 337, 343.

(3) [1908] 2 Ch. 441.

(4) 4 Burr. 2303, 2396.

(5) [1908] 1 Ch. 567; [1908] 2 Ch. 441.

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we are not concerned here with the interesting but now obsolete question whether a common law right ever subsisted after publication, a question which will be found sufficiently discussed in the pages of Copinger on Copyright, 3rd and 4th eds.; Scrutton on Copyright, caps. I. and II.; and Holdsworth: History of English Law, vol. vi., pp. 360 to 379. I am content to say that an author at any time before the Copyright Act, 1911, had the incorporeal right before publication which I have mentioned. One result of this may be noted here that, if an author (before 1912) possessed unpublished works at the date of his death, whether in the form of letters, diaries, journals or other literary works of any kind, his legal personal representatives, by virtue of the common law right of the author, were prima facie entitled (subject, of course, to any provision in his will) to restrain the publication. The final words of s. 3 of the Act of 1842 do not say or imply that the proprietor of the manuscript may publish the work of the late author. The implication was that, if such proprietor got permission to publish, he then obtained the statutory copyright. This was stated to be the result in the judgment of Buckley L.J. in *Macmillan & Co.* v. *Dent* (1), a passage with which I respectfully agree.

The question then arises what an author, making his will in 1870 or, indeed, at any time between 1842 and 1912, meant by a bequest of his copyrights to a named person. Counsel for the appellants sought to contend that the common law right of the author before publication could not properly be described as "copyright," a term they sought to confine to statutory copyright after publication. I do not agree, and as the matter is of some interest I propose to give reasons for my opinion; but I should observe that if the will had not mentioned copyrights at all, they would have passed under the gift of residue, and this, in my opinion, would have included the testator's right to restrain publication of his unpublished works. As early as the year 1767, the jury in *Millar* v. *Taylor* (2) found as part of their special verdict "that before the reign of her late Majesty Queen Anne, it was usual to

(1) [1907] 1 Ch. 107, 131. (2) 4 Burr. 2303, 2307.

purchase from *authors* the *perpetual copy-right of their books*; and to *assign* the same from hand to hand, for valuable considerations." That which the authors sold to the publishers was a two-fold right, first, the exclusive right to publish (so far as the authors could confer it)—and this necessarily involved the handing over of copies of the works—and secondly, the exclusive right (so far as the authors could confer it) of printing or otherwise multiplying copies of the works. The text-books I have referred to must be consulted to see how far the authors at any particular date could confer these two rights in an exclusive manner; but as soon as the term "copyright" came into general use I am satisfied that in the mouth of an author it meant the two-fold right. The late Sir Thomas Scrutton, it is true, said in the book above referred to that the common law right cannot rightly be called "copyright" (Scrutton on Copyright, cap. II.), and he cited Lord Brougham in *Jefferys* v. *Boosey*. (1) In my opinion this is too broadly stated, and I think Lord Brougham did not express that opinion. It is, however, to be noted that Sir Thomas Scrutton himself (like other writers) constantly uses the phrase "common law copyright" as including the author's right before publication, and that it is constantly so used by the judges in their answers to the questions put to them in *Jefferys* v. *Boosey*. (1) (For example, see the answer given by Coleridge J. passim.) It is true that the right sold to the publisher used to be referred to as "the copy": see *Millar* v. *Taylor*. (2) It was for instance that right under the technical name of the "copy" which Milton dealt with when he sold "Paradise Lost" on April 27, 1667, to Samuel Simmons for an immediate payment of 5*l.* (with a stipulation for certain further sums of 5*l.* after thirteen hundred copies should be sold of the first edition), though it should be remembered that at that time he had had to obtain a licence to print under the Licensing Act of 1662, and that no person could print without his consent (s. 6 of that Act). Doctor Johnson in his Life of Milton described the sale simply as a sale of "the copy." And in other places in the Lives of

(1) 4 H. L. C. 815, 962. (2) 4 Burr. 2303, 2396.

the Poets Dr. Johnson (who took a writer's natural interest in these transactions) used the same word; for example, in the Life of Addison (dealing with the sale of a forgotten comedy by Addison called "The Drummer") he remarks that "Steele . . . . sold the copy for fifty guineas." I am not sure that Johnson ever used the word "copyright" in his writings, and he certainly did not include it in his Dictionary (published in 1755); as a lexicographer he may have disapproved of the word; but Boswell, in the Life, uses it with the same meaning as that in which Johnson uses the word "copy." In the Life for the year 1748 Boswell employs the phrase "a considerable deduction from the price stipulated to be paid for the copyright." Blackstone, in 1767 (Commentaries, vol. ii., 407), talks of legislative recognitions of "copyright." There are many earlier uses of the word as indicating the author's rights, and it is clear that when an author spoke of selling his "copy" or his copyright—for the latter word became a synonym for "copy" in the technical sense—he referred to the two-fold right, since the publisher necessarily had to acquire the common law right to publish. It is not, of course, in dispute that the two rights are distinct, and it is not doubted that Parke B. was right when he drew the distinction between the two senses in which the word "copyright" might be understood: *Jefferys* v. *Boosey.* (1)

The conclusion I come to is that long before the year 1870 authors used to refer to their rights in published and unpublished works as copyrights. I can see no sound ground for doubting whether, if Charles Dickens had finished some novel or story but had not published it at the date of his death, it would have passed under the bequest of his copyrights. Nor can I see that any different conclusion should be arrived at in the present case because of the bequest to Miss Hogarth of "all his private papers whatsoever." This phrase, standing alone, obviously does not properly or naturally carry with it a right to publish private papers. (Comp. *Duke of Queensberry* v. *Shebbeare.* (2)) In my opinion, on the true construction of the will, the exclusive right to publish the Life

(1) 4 H. L. C. 815, 919.

(2) 2 Eden, 329.

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of Christ passed to John Forster and Miss Hogarth as trustees, whilst the original manuscript became the personal property of Miss Hogarth. If the trustees and Miss Hogarth could not agree there would be a sort of deadlock. The trustees might, perhaps, have published from a copy, but Miss Hogarth could not properly have published from the original without the consent of the trustees.

The Copyright Act, 1911, came into force on July 1, 1912, and from that date a statutory protection called " copyright " was given to the unpublished works of authors, and by s. 31 the previous rights of authors were abolished. By the joint operation of s. 24, sub-s. 1, and the provisions of the First Schedule, works which were unpublished on July 1, 1912, are protected. In the case of such works copyright was defined, for the purpose of the Schedule, as including " the right at common law (if any) to restrain publication or other dealing with the work." It follows, then, that if the trustees of Charles Dickens on July 1, 1912, were possessed of the right at common law (if any) to restrain publication or other dealing with the work, they at once acquired the copyright as defined in the Act of 1911. It seems to me reasonably clear that they were possessed of such a right at common law. They could sue at common law for the recovery of the piratical copies, for such copies became their property; see s. 23 of the Act of 1842. This section clearly enabled them to restrain a " dealing " with the work. It is true that if they desired to obtain an injunction they would have had to apply to an equitable jurisdiction, but the Legislature cannot be taken to be unaware of the fact that injunctions to enforce rights at common law were commonly granted by equitable Courts. On the other hand, I cannot think that the phrase is apt to describe the right of the owner of a manuscript to preclude the rest of the world from having physical access to it. It follows, then, that the copyright in the Life of Christ, under the Act of 1911, remained part of the property held upon the trusts of Charles Dickens' will. I do not think that the matter is affected by s. 17, sub-s. 2, of the Act, assuming that to be applicable to the case of a will which became effective

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before July 1, 1912, since the section only makes the ownership of the manuscript acquired by the author's will and not published prima facie proof of the copyright being with the owner of the manuscript. In my opinion, it is proved in the present case that the copyright did not pass with the ownership of the manuscript. It does not seem to be necessary to express any opinion on the point whether s. 17, sub-s. 2, ought to be applied to wills becoming effective before July 1, 1912, in cases where no title has been acquired under s. 3 of the Act of 1842. Where a title has been acquired, s. 17, sub-s. 2, would, of course, have no application. I will, however, add that I agree with what Romer L.J. has pointed out—namely, that s. 17, sub-s. 2, is in effect only a rule of procedure and ought to be regarded from that standpoint.

What, then, is the final result in view of the fact that Lady Dickens, being at the same time executrix and trustee of the estate of Charles Dickens and also executrix of the late Sir Henry Dickens, the owner of the original manuscript, by deed dated February 6, 1934, sold the copyright in the said work for a large sum while retaining the right to the ownership of the manuscript ? The learned judge, with whose decision I am in substantial agreement, does not appear to have had his attention called to this aspect of the matter ; but the Court of Appeal was requested not merely to answer the precise questions contained in the originating summons but also to assist the parties concerned by giving a decision as to the rights in respect of the purchase money. It is to be noted that the assignment of February 6, 1934, provided for the supply to the purchasers of a true copy of the original work, and gave permission to photograph it and to reproduce the same. Lady Dickens and her children jointly and severally covenanted that the original manuscript was wholly in the handwriting of Charles Dickens and that there was no other manuscript in his handwriting. In my opinion, it is reasonably clear that this actual sale was made possible only by reason of the circumstance that Lady Dickens, as trustee of Charles Dickens, was able to sell the copyright under the Act of 1911, and as trustee of Sir Henry Dickens was able to produce the original manuscript in the handwriting of Charles Dickens and also to give leave to photograph the original and to publish the photographs. It is a matter for conjecture as to what sum would have been paid by the purchasers on the sale of the copyright if only a copy of the original had been produced. In these circumstances, my opinion is that part of the sum realized properly belongs to the estate of Sir Henry Dickens and part to the estate of Charles Dickens. There are no materials for apportioning the sum otherwise than in equal shares between the two estates; and that is, in my opinion, the proper conclusion, not only because, according to the language of Lord Somers (*Petit* v. *Smith* (1)), "equity did delight in equality," but also because, in the exceptional circumstances of the present case, the two contending parties have equal rights to share in the proceeds of sale.

LORD HANWORTH M.R. The order of the Court will need a little attention because we are varying the order of Bennett J. We think that the originating summons ought to be amended by entitling it also "In the matter of the estate of Sir Henry Fielding Dickens." Then we vary the order of Bennett J. by omitting the declaration therein secondly contained and in lieu thereof declaring "That the copyright in the said work was vested in the plaintiff as legal personal representative of the testator and that one equal moiety of the consideration money received by Lady Dickens under the assignment of February 6, 1934, ought to be held upon the trusts applicable to the residuary estate of the testator, Charles Dickens." Then the cross-appeal is dismissed. With regard to the costs, the order will be this: in lieu of the direction as to costs contained in the said order of Bennett J., order that the costs that are thereby directed be taxed and paid out of the said consideration money and the costs of the appeal and of the cross-appeal as between solicitor and client be taxed and paid in the same way.

Order varied.

Cross-appeal dismissed.

Solicitors: *Hempsons; Field, Roscoe & Co.*

W. I. C.

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(1) (1695) 1 P. Wms. 7, 9.

CROSSMAN J.
1934
Nov. 21, 22.

WARING (LORD) *v.* LONDON AND MANCHESTER ASSURANCE COMPANY, LIMITED, AND OTHERS.

[1934. W. 3168.]

Mortgage—Power of Sale—Contract for Sale—Injunction to restrain Completion—" Sale "—Under-value—Good faith—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 89, *sub-s.* 1 ; *s.* 101, *sub-s.* 1 ; *s.* 104, *sub-ss.* 1, 2.

The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith.

A company entered as mortgagee into a contract for the sale of the mortgaged property. The mortgagor had been given many opportunities to find the money due under the mortgage and, at his request and upon his undertaking to put the property up for sale by auction, the company had refused a good offer to purchase. When the mortgagor did put the property up for sale by auction (when the period within which he had undertaken to do so was past) no acceptable bid was received, and, after a long period during which he was to the company's knowledge negotiating with a third party for a fresh loan on the security of the mortgaged property, and during which the company, in order to help him as much as possible, had postponed selling, the company ultimately contracted to sell the property for an amount less than that which it had refused at his request and upon his undertaking. On a motion by the mortgagor for an injunction to restrain completion on the grounds that there was no sale until conveyance and that the contract had been entered into in bad faith at a gross under-value, and for leave to redeem the property upon paying into Court, as he claimed to be able to do, the moneys due under the mortgage :—

Held, (1.) that a mortgagee's exercise of his power under s. 101, sub-s. 1, para. (i.), of the Law of Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith :

(2.) that the fact that a contract for sale was entered into at an under value is not by itself enough to prove bad faith.

Warner v. *Jacob* (1882) 20 Ch. D. 220 considered.

MOTION.

This was a motion in an action by a mortgagor for an injunction restraining the mortgagee and an intending purchaser from completing by conveyance a contract which had been entered into for the sale of the property comprised in the mortgage. The motion raised the question whether a mortgagor, on tendering the principal and interest due under the mortgage, is entitled to an injunction restraining completion by conveyance of a contract already entered into by the mortgagee, as mortgagee, for the sale of the property comprised in the mortgage, and to redemption of the property.

By an instrument of charge dated July 12, 1929 (and hereinafter called "the charge"), the Right Honourable Samuel James Baron Waring of Foots Cray (hereinafter called "the plaintiff") demised to the London and Manchester Assurance Company, Ld. (hereinafter called "the company"), the property therein comprised by way of mortgage for securing payment to the company on November 12, 1929, of 180,000*l.* with interest thereon at the rate of 7 per cent. per annum, payable quarterly.

On May 12, 1930, the plaintiff made default in payment of interest due under the charge, and on August 6, 1930, when interest was more than two months in arrear, the company, in exercise of powers conferred on it by the charge, appointed a receiver of the property. In or about September, 1930, an offer of 180,000*l.* was made for the property. It was later increased to 200,000*l.*, which amount was formally offered in December, 1930, but was refused. In July, 1932, the property was put up for sale by auction, on the plaintiff's instructions, at a reserve price of 220,000*l.* No bid approaching that price was received, and the property was not sold. From September, 1932, to July, 1934, the receiver made many attempts to sell it, none of which succeeded.

On July 4, 1934, the plaintiff was informed that there were negotiations for a sale and, by a letter dated August 2, 1934, he was informed that the intending purchaser under the contract the completion whereof he sought to restrain by this motion (hereinafter called "the purchaser") was pressing for an immediate exchange of contracts. At this time the plaintiff was negotiating with the Yorkshire Insurance Company, Ld. (hereinafter called "the Yorkshire company"), for a loan of 200,000*l.* on the security of the property. The company knew of the negotiations. On or about August 11, 1934, the plaintiff sent to the company a letter received by him from a director of the Yorkshire company stating that a provisional survey of the property had been made by a gentleman who would be before the Yorkshire company's board on the following Wednesday. There could, however, be no completion until the director who had written the letter had returned, on September 5, 1934, from his holidays. By a letter dated August 14, 1934, the receiver informed the plaintiff that the company would not hold the matter open until September 5, 1934, unless it received direct from the Yorkshire company, after the board meeting referred to, a letter stating that, subject only to title, the loan of 200,000*l.* had been definitely passed. The company, however, received no letter from the Yorkshire company to that effect. By a letter dated August 20, 1934, the receiver again informed the plaintiff that the company could not hold the matter open until September 5, 1934, that he (the receiver) had been instructed that other negotiations were to be proceeded with, and that contracts for the sale of the property were likely to be exchanged that week. After an interview, the receiver, in a letter dated August 30, 1934, told the plaintiff upon what terms the company would delay the sale. The plaintiff did not comply with the terms, and by a letter dated September 27, 1934, the receiver informed him that, as he had not complied with them, the company was proceeding with the sale and expected to exchange contracts on October 1, 1934. On the next day the plaintiff informed the receiver by letter that the Yorkshire company had received a satisfactory valuation, had agreed to lend him 200,000*l.*, and would be communicating with the company's solicitors. On September 29, 1934, the plaintiff's solicitors informed the company's solicitors by telephone that the director of the Yorkshire company who had written to the plaintiff would call on October 1 to discuss repayment of the money due to the company under the charge. He did not call on that date, and on October 2, 1934, the plaintiff's solicitors informed the company's solicitors by telephone that he would call that day. He did not call, and in the afternoon the plaintiff's solicitors informed the company's solicitors by telephone that he would call on the morning of October 3, 1934. He did not call then or at any time, and at a meeting of its board of directors held in the afternoon of that day the company decided to exchange contracts. Contracts were exchanged with the purchaser in the afternoon of October 3, 1934. The purchase price was 186,000*l.*, completion was to take place on December 24, 1934, and the company was expressed to be selling as mortgagee. The company's solicitors verbally informed the plaintiff's solicitors that completion was to take place on or before December 24, 1934. By a letter dated November 9, 1934, the plaintiff's solicitors, who by that time knew that the contract of October 3, 1934, had been entered into, informed the company's solicitors that the plaintiff was in a position to pay off the mortgage.

The company refused to give an undertaking not to complete on December 24, 1934, and on November 21, 1934, the plaintiff by this motion asked (inter alia) for an injunction to restrain the company and the purchaser from carrying into effect the contract of October 3, 1934, and asked also that the plaintiff might redeem the property. Evidence was given by affidavit that the offer to purchase made in December, 1930, was refused by the company at the plaintiff's request and upon his undertaking (which was not carried out) to put the property up for sale by auction at an early date.

F. R. Evershed K.C. and *A. P. Vanneck* for the plaintiff. Ever since the date of the contract the company has known, from the plaintiff's information, that the plaintiff is in a position to bring 200,000*l.* into Court. The first contention on the plaintiff's behalf is that, in law, the mere entering into a contract for sale of the property comprised in a mortgage does not exclude the mortgagor's right of redemption: the second, that, on the evidence, the contract now before the Court was entered into at a gross under-value. As to the first contention, the Court is here dealing with a case in which the plaintiff is not asking that a sale which has been completed should be set aside. The fact that the sale has not been completed is material on the question whether the company has been reckless. Had the sale been completed, the plaintiff would be in a very difficult position if he asked the Court to set aside the contract: as it has not, the position is altogether different.

[CROSSMAN J. There has been a sale, but no conveyance. Is there not a sale when the auctioneer puts his hammer on the desk ?]

There is not a sale, but a contract for sale. In the Law of Property Act, 1925, there is nothing whatever to shut out the equity of redemption until conveyance, and until conveyance the mortgagor is entitled to pay the moneys due and have the contract set aside.

[CROSSMAN J. If I decided that that was so, the consequences would be very serious.]

The contract here is a contract for sale by a mortgagee and is expressed so to be. The purchaser thus knows that he is buying from a mortgagee exercising a power of sale, and therefore takes subject to the risk of the plaintiff's coming to redeem before completion.

[CROSSMAN J. Do you say that a sale by a mortgagee does not bar the equity of redemption ?]

No: the contention is that a contract for sale by the mortgagee does not bar it.

[CROSSMAN J. How do you distinguish between a sale and a contract for sale ?]

The contention is that the equity of redemption is not barred by a sale until the moment of completion. Notwithstanding the exercise of the power of sale it is only completion that extinguishes the equity of redemption. Under s. 89, sub-s. 1, of the Law of Property Act, 1925 (a section dealing with the realization of leasehold mortgages), where a mortgagee sells under his statutory power, the conveyance by him operates "(*a*) . . . . to convey to the purchaser . . . . the mortgage term, ..." and " . . . . also (unless expressly excepted with the leave of the court) the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority to the mortgage in right of which the sale is made and to any money thereby secured, and thereupon (*b*) the mortgage term, or the charge by way of legal mortgage and any subsequent mortgage term or charge, shall merge in such leasehold reversion or be extinguished unless excepted as aforesaid; . . . ." All that s. 101, sub-s. 1, para. (i.), of the Act does is to give to a mortgagee, where the mortgage is made by deed, " . . . . power, when the mortgage money has become due, to sell, ... the mortgaged property, ... by public auction or by private contract, ..."

[CROSSMAN J. Does that mean that his exercise of the power is subject to the mortgagor's right of redemption ?]

Yes. That provision, as it stands, gives him merely the right to enter into a contract to sell the property and nothing more. Sect. 104, which is the most material section in the present case, provides by sub-s. 1 that a mortgagee exercising the power of sale conferred by the Act " . . . . shall have power, ... to convey the property sold, ... freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage." Sub-s. 2 of the section provides that " where a conveyance is made in exercise of the power of sale conferred by this Act, ... the title of the purchaser shall not be impeachable on the ground—(*a*) that no case had arisen to authorise the sale; or (*b*) that due notice was not given; or (*c*) where the mortgage is made after the commencement of this Act, that leave of the court, when so required, was not obtained; or (*d*) whether the mortgage was made before or after such commencement, that the power was otherwise improperly or irregularly exercised; and a purchaser is not, ... concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power." The governing words of the sub-section are: " Where a conveyance is made in exercise of the power of sale conferred by this Act, ..."

There is clearly nothing in ss. 89, 101 and 104 of the Act that has the effect of excluding the equity of redemption before conveyance. If the Court holds that entry into a contract for sale excludes it, what happens if the contract is not carried out?

[Crossman J. I suppose it excludes it subject to completion.]

That is exactly the point. As to the purchaser's position, he is not concerned, in cases where the mortgagee has not expressly contracted as mortgagee, with the risk of the mortgagor's coming to redeem. Here, however, as the company has so contracted, he is concerned with that risk: and further, as the company has acted recklessly in contracting to sell at a gross under-value, the Court should grant the injunction which the plaintiff seeks.

J. M. Gover K.C. and *H. F. F. Greenland* for the company. The Court will grant the injunction only upon being satisfied that there has been misrepresentation, fraud, or bad faith. The allegation that the contract was entered into at a gross under-value is an allegation of fraud: that is its only relevance.

The first contention on the plaintiff's behalf raises a point which is purely one of law and which arises on the assumption that the sale is free from objection in all other respects. The contention is, in effect, that the Legislature has caused to be implied in mortgages a statutory power to the mortgagee to sell or contract to sell the mortgaged property, which power is provisional or contingent. If that were correct, the mortgagee's power of sale would be a mere fiction. The contention confuses power to sell with power to convey. Conveyance is simply the machinery by which the legal title is passed.

As to the second contention on the plaintiff's behalf (namely, that the contract was entered into at a gross under-value), the Court will stop a sale by a mortgagee only if it has been brought about by want of good faith on his part. Want of good faith really means dishonesty, of which, in the present case, there is no suggestion. The making of the contract was postponed out of consideration for the plaintiff and in the hope that he might do something. The evidence shows conclusively that the company exercised its power of sale in good faith and without corruption. Both of the contentions on the plaintiff's behalf thus fail, and the injunction should therefore not be granted.

R. W. Goff for the purchaser.

G. D. Johnston for a second mortgagee.

CROSSMAN J. [after stating the facts:] The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court in proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgment, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside. Counsel for the plaintiff, who has argued the case most excellently, submitted that, notwithstanding that the company exercised its power of sale by entering into the contract, the plaintiff's equity of redemption has not been extinguished, as there has been no completion by conveyance, and that, pending completion, the plaintiff is still entitled to redeem, that is, to have the property reconveyed to him on payment of principal, interest, and costs. Counsel is relying, to some extent, on the provisions of the Law of Property Act, 1925, which creates a statutory power of sale. In my judgment, s. 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor.

It seems to me impossible seriously to suggest that the mortgagor's equity of redemption remains in force pending completion of the sale by conveyance. The only effect of the conveyance is to put the legal estate entirely in the purchaser: that follows from s. 104, sub-s. 1, of the Law of Property Act, 1925, which provides that a mortgagee shall have power to convey the legal estate; and the whole legal estate can be conveyed free from all estates, interests, and rights to which the mortgage has priority. Sect. 104, sub-s. 2, upon which also counsel for the plaintiff relied, does not seem to me to affect the question at all. Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course, if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment, he gets no good title on taking the conveyance. The result in the present case is, in my judgment, that the sale effected by the contract, assuming, for the moment, that there is no objection to it on any other ground, binds the plaintiff, and that it is too late after the sale for him to tender the mortgage money and become entitled to have the property reconveyed to him.

A second point taken by counsel for the plaintiff is that the sale, considered as a pending sale, cannot be allowed to stand because it was made at a gross under-value, an under-value which would entitle the plaintiff, as mortgagor, to have it set aside. I do not want to go through all the evidence again. After having gone through the evidence of the four years between the date of the mortgage and the date of the contract, I can find no evidence showing anything like lack of good faith in the company's conduct with regard to the sale. The law, as stated by Kay J. in *Warner* v. *Jacob* (1), is perfectly clear. The learned judge there says: ". . . . a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud." In my judgment it is impossible on the facts of this case to conclude that the price is so low as in itself to be evidence of fraud. It is true that there is some suggestion that the Yorkshire company is willing to advance on mortgage an amount larger than that of the purchase money, which implies, presumably, that the value which the Yorkshire company puts upon the property must also be considerably larger. I do not consider, however, that that in itself is evidence of fraud. In my judgment there must be something far beyond the mere fact of under-value. For at least three years the company has been trying to find a purchaser for the property: it has made every possible effort, and the plaintiff has himself put the property up for auction and obtained no effective bid. There were negotiations throughout the whole period and, at some time at the beginning of summer in the present year, a purchaser was found who was likely to enter into a binding contract. Immediately afterwards, as I understand (I think it was in July), the company informed the plaintiff that there were negotiations with a purchaser, who was in fact the purchaser who entered into the contract, and the plaintiff was, in effect, warned that that purchaser would have to be accepted if nothing else could be done. Opportunities were given to him to find the money in other ways, but in fact nothing actually was done and, at the last moment, on September 29, the plaintiff informed the company that

(1) 20 Ch. D. 220, 224.

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WARING (LORD) v. LONDON AND MANCHESTER ASSURANCE CO.

an insurance company (the Yorkshire company) had agreed to advance an amount larger than that of the purchase money. Both he and his solicitors informed the company that somebody would be coming to its registered office to make the matter quite clear. Nobody, however, did come to the company's registered office, and it was not unreasonable that the company's board of directors should conclude, when they met (I think, on October 3), that they must enter into the only firm contract before them. In that way the contract was entered into.

In my judgment it is impossible for me to accept the suggestion that there has been a lack of bona fides in the present case, and, that being so, the contention that the plaintiff is entitled, on the ground that the sale was made at a gross under value, to an injunction restraining the defendants from completing, also fails. In the circumstances, I do not think I can make any order on the motion.

Solicitors: *Biddle, Thorne, Welsford & Gait; W. H. Matthews & Co.; Hicks, Arnold & Bender; Joynson-Hicks & Co.*

K. R. A. H.

CLAUSON J.
1934
Oct. 29, 30.

MARKHAM *v.* DERBY CORPORATION.

Local Government—Town Planning Scheme—Compensation—Claim by person whose property is injuriously affected by "the making" of a Scheme—Time when Scheme made—Approval of Minister of Health—Town Planning Act, 1925 (15 *Geo.* 5, *c.* 16), *s.* 2, *sub-ss.* 2, 3; *s.* 10.

By s. 10 of the Town Planning Act, 1925, it is provided that any person whose property is injuriously affected by the making of a town planning scheme shall, if he makes a claim within the time limited by the scheme, be entitled to obtain compensation in respect thereof from the responsible authority. And by s 2 of the Act it is provided that a town planning scheme shall not have effect, unless it is approved by an order of the Minister of Health, who may refuse his approval except with such modifications as he thinks fit, and a scheme when so approved shall have effect as if it were enacted in the Act:—

Held that, upon the true construction of the Act, the person entitled to obtain compensation under s. 10 is the person whose property, at the date of "the making" of the scheme, that is, when an order has been made by the Minister approving the scheme, and not before, is injuriously affected thereby.

CLAUSON J.

1934

MARKHAM v. DERBY CORPORATION.

SPECIAL CASE.

The official arbitrator pursuant to s. 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, stated his award on October 20, 1932, in the form of a special case for the opinion of the Court on a question of law which involved the construction of s. 10 of the Town Planning Act, 1925.

So long ago as March 1, 1918, the Corporation of Derby passed a resolution under s. 54 of the Housing, Town Planning, etc., Act, 1909, that the Minister of Health be requested to authorize the Corporation to prepare a scheme with reference to "Chaddesden Park" within their area: and, on April 11, 1923, a scheme for the reservation out of Chaddesden Park of sixty and a half acres as a public space was duly deposited at the Town Hall, Derby, of which deposition George William Jessop, the then owner of Chaddesden Park, was given notice.

On December 17, 1925, the said G. W. Jessop contracted to sell Chaddesden Park containing seventy-four and a half acres to Sir Charles Markham, the claimant, and on September 20, 1926, conveyed the same to him.

On March 14, 1929, the Minister of Health made an order approving the scheme and, consequently, by virtue of clause 74, sub-clause 1, of the scheme, the scheme "commenced" on that date.

On September 2, 1929, Sir Charles Markham claimed from the Corporation the sum of 33,337*l.* as compensation in respect of the reservation of sixty and a half acres out of his said property, a claim which at the hearing before the arbitrator in June, 1931, was reduced to 16,650*l.*; and 4495*l.* was claimed for interest thereon.

By his award made on October 20, 1932, the arbitrator stated that, if in the opinion of the High Court the claimant was entitled to compensation, he assessed the compensation at 4396*l.*

At the hearing before Clauson J. the claimant withdrew his claim for interest. The contention of the Corporation was, in the main, that the date of "the making of" the scheme was the date of the resolution of March 1, 1918: on the other hand, the claimant's contention was that the date in question was March 14, 1929, when the Minister of Health made his order approving the scheme.

Neville Gray and *Jasper More* for the claimant. No scheme under the Act can become effective, until it has been approved by an order of the Minister of Health: see s. 2, sub-s. 2, of the Town Planning Act, 1925. The scheme, after having been so approved, takes effect as if it had been enacted in the Act (see s. 2, sub-s. 3); and by clause 74, sub-clause 1, of the approved scheme, the scheme was not to "commence" until March 14, 1929. The claimant does not claim any compensation on account of any building or of any thing done in respect to the land included in the scheme after the date of the resolution to adopt the scheme or after the approval of the scheme by the Minister, as nothing has been done which could make sub-s. 2 of s. 10 of the Act applicable. On March 14, 1929, when the scheme became effective, the claimant, to whom the land had in 1926 been sold and afterwards conveyed and who was the owner of the land at the time when the claim to compensation came to be made, is the person entitled to claim and obtain compensation on account of his land being injuriously affected by "the making of" the scheme. Clause (*c*) in sub-s. 2 of s. 10 of the Act refers in express terms to claims by the persons who had purchased the land after the date of a resolution to prepare a scheme; the date of the "making of" the scheme being, upon the proper construction of the Act, the date when the scheme was in 1929 approved by the Minister, and not the date of the resolution passed in 1918 by the corporation.

William Allen K.C. and *F. A. Martineau* for the Corporation of Derby. The arbitrator misdirected himself on the point of law. The crucial date is not when the scheme is approved by an order of the Minister, but when the resolution of the local authority is passed, that is, when the land became sterilized. Upon its true construction, the Act, by s. 10, aims at giving compensation to the person who is the owner of the land injuriously affected when the resolution is passed, and that person was, in this case, at that date, namely 1918, not the claimant but his vendor who afterwards sold the land to the claimant. The claimant's proper course (of which he did not avail himself) was to apply for an interim development order under s. 4 of the Act and the Town Planning (General Interim Development) Order, 1922.

CLAUSON J. This is a case stated by an official arbitrator on a point of some interest, a point as to which I confess I myself entertain no doubt.

By the Town Planning Act, 1925, the machinery of which has now become fairly familiar to those who are in the habit of dealing with these matters, it is provided by s. 10 that any person whose property is injuriously affected by the making of a town planning scheme shall, if he makes a claim for the purpose within the time limited by the scheme, be entitled to obtain compensation in respect thereof from the responsible authority. That section, as I understand it, says quite plainly, " find the date when a town planning scheme is made ; if at that date there is a person whose property is injuriously affected, that person, by virtue of his ownership of the property which is injuriously affected, is entitled to obtain compensation in respect of the injurious affection sustained by his property by reason of the town planning scheme being made." In this particular case, the inception of the town planning scheme dated back a considerable number of years and for a long time the scheme was in an embryonic condition. A point of time came at which the scheme, so far as the local authority itself was concerned, was settled and was submitted for the approval of the Minister of Health ; and it is suggested on the one hand that the time when the scheme was made was the time when the local authority passed a resolution which was the condition precedent to their depositing the scheme in its final form and accordingly that the scheme was made before it was, on March 14, 1929, approved by an order of the Minister. On the other hand, the contention is that the scheme was made on March 14, 1929, when the Minister approved the scheme.

I refer to s. 2 of the Act of 1925 and find that (see sub-s. 2) a town planning scheme prepared or adopted by a local authority shall not have effect, unless it is approved by order of the Minister and the Minister may refuse to approve any scheme except with such modifications as he thinks fit. Sub-s. 3 enacts that a town planning scheme when approved by the Minister shall have effect as if it were enacted in this Act. I read the Act as meaning that, until the scheme has been approved by the Minister, it has no operation at all, subject only to this proviso, that the fact that there is a scheme pending which has not yet received approval is material for one purpose, namely, that, if during that period while the scheme is in embryo, the owner of the land affected by the scheme puts up some buildings or erections—I am not putting it quite accurately but in general terms which are sufficiently accurate for the purpose in hand—knowing that there is a project on foot to carry through a scheme which would prevent his land from being used with those buildings on it, or prevent them from being used for a particular purpose, he will build at his own risk, if the scheme should ultimately materialize and become a "made" and effective scheme; and when he comes to claim compensation, he may find that for that purpose he will be treated on the footing of his not having done the thing in respect to the land which he took the risk of doing: he must take the risk that the scheme when finally approved by the Minister may have the effect of interfering with his free user of the land. But, subject to that proviso which has to do with compensation and nothing else, the scheme has no effect at all, until it is approved by the Minister. Even though the local authority should pass a resolution, non constat that the scheme will come into force; the Minister has power to and may refuse to approve it, unless it is modified. The whole matter is at large until the Minister's final approval.

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I then turn back to s. 10, which is aimed at giving compensation to a person whose property is injuriously affected by the making of the scheme. In my view the only way of making the Act work is to construe it as enacting that the date of "the making of" the scheme is the date when the scheme becomes a binding scheme, having effect as if it were enacted by the Act. I cannot treat the scheme as made when the period has not arrived at which it is to have effect by reason of the approval of the Minister having been placed upon it.

In my view it is a simple question of the construction of the words of s. 10. I can see no ambiguity or difficulty; but it is only right that I should add that there are other provisions in the Act which certainly seem to be inconsistent with any other view, and these it might be important for me to analyse in some detail, if I thought the words of s. 10 were ambiguous. As Mr. Gray says, if you give any other meaning to the expression "the making of a town planning scheme" than that of its coming into force by the Minister's approval, there is great difficulty in applying the proviso to the second sub-section of s. 10. And further, there would appear to be considerably difficulty in the working of sub-s. 3 of s. 10, if the words "making of any town planning scheme" in that sub-section have any other meaning than that which I have placed on the corresponding words in sub-s. 1 of s. 10.

The result is that, in my judgment, the claimant in this case is entitled to recover compensation from the local authority; and, accordingly, under the terms of the award he will be entitled to the sum that Mr. Webster, the arbitrator, has fixed and to the costs which Mr. Webster has mentioned in his award—namely, the costs of the arbitration and the proceedings before me to be taxed.

There will be a declaration that, the claimant withdrawing any claim to interest, is entitled to recover the compensation fixed by the arbitrator, videlicet 4396*l.* And although the finding of the arbitrator as to the costs of the proceedings in this Court is not binding on me, I propose to deal with those costs in the way the arbitrator has suggested, and to order that those costs as well as the costs of the arbitration be

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taxed by the taxing master and be paid by the acquiring authority.

Solicitors: *Peacock & Goddard, for Moody & Woolley, Derby; Sharpe, Pritchard & Co., for C. Ashton, Town Clerk, Derby.*

H. C. H.

CLAUSON J.
1934
Dec. 3, 4, 7.

In re ARDEN.

SHORT *v.* CAMM.

[1934. A. 2161.]

Settlement—Appointment—Real Estate—Equitable Estate—Absence of words of Limitation—Intention of Appointor.

When strict conveyancing phraseology is not employed in the limitation of an equitable estate in freehold hereditaments, the grant thereof will carry the fee simple, if the instrument upon its proper construction discloses a clear intention to pass it: see *In re Bostock's Settlement* [1921] 2 Ch. 469; per Lord Sterndale M.R. at p. 480, per Warrington L.J. at p. 483, and Younger L.J. at pp. 489, 490.

In exercise of a special power of appointment among her children given by the will of the testator to Mrs. C., a married daughter of the testator, Mrs. C. appointed that one third share of certain freehold hereditaments and of the investments for the time being representing the same should be held in trust for her daughter E. N. her heirs executors administrators and assigns absolutely. Later, in 1901, in exercise of the same power, Mrs. C. by a deed made supplemental to the former deed of appointment, appointed that the trustees of the testator's will should stand possessed of the residue then remaining unappointed of the said hereditaments in trust, as to one fourth share thereof for the said E. N. and as to three fourth shares thereof for her son C. absolutely:—

Held, applying the principle stated above, that the appointment made in 1901 in favour of E. N. and C. upon its true construction carried the fee simple to those appointees according to their respective appointed shares.

ADJOURNED SUMMONS.

Richard Edward Arden, who died on April 17, 1894, by his will made on June 22, 1883, devised certain freehold hereditaments specifically described therein by reference to a schedule to his will to trustees upon trust to pay the net rents and profits thereof to his married daughter Mrs. Caroline Arden Camm during her life and after her death to hold the said hereditaments in trust for all or such one or more of her children and if more than one in such shares to vest at such time or times with such provisions for their respective maintenance education and advancement or otherwise and generally in such manner and form in every respect as she should by any deed or deeds or by her will appoint and in default of and subject to any such appointment in trust for her children in equal shares as tenants in common.

By a deed poll dated October 12, 1896, and made upon the occasion of the marriage of her daughter Evelyn with Arthur H. Nelson, Mrs. Camm, in exercise of her power under her father's will, appointed that a one-third share of the said hereditaments and of the investments for the time being representing the same should, subject to the life interest therein of the appointor, be held in trust for her said daughter Evelyn her heirs executors administrators and assigns absolutely.

By another deed poll dated October 27, 1896, and made by way of amplification of the former appointment, Mrs. Camm appointed that one-third share of the trust property the income whereof was given to her by the will of her father and of all other property which might then or thereafter become, whether in her lifetime or after her death, subject to the trusts declared by the will in respect of the said trust property should, subject to the life interest of the appointor under the trusts of the will, be held in trust for her daughter Mrs. Evelyn Nelson her heirs executors administrators and assigns absolutely.

By a deed poll dated January 19, 1901, and expressed to be made supplemental to the will of the said testator and to the two former deeds of appointment, after a recital that the appointor was desirous of appointing the residue remaining unappointed of the said hereditaments trust funds and property between Mrs. Evelyn Nelson and the appointor's son

Cuthbert Camm in manner thereinafter appearing, it was witnessed that Mrs. Camm in exercise of the power given to her by her father's will directed and appointed that the trustees thereof should, from and after her death and in the meantime subject to her life interest therein, stand possessed of the whole of the residue then remaining unappointed of the hereditaments trust funds and property the income whereof was by the will given to the appointor and all other property which might then or thereafter become, whether in the lifetime of the appointor or after her death, subject to the trusts declared by the will in respect of the said trust premises in trust as to one fourth share for Mrs. Evelyn Nelson and as to three fourth shares for Cuthbert Brooke Camm absolutely. And by the same deed power was reserved to the appointor to revoke the appointment thereby made, a power which was never exercised.

Mrs. Camm died on March 27, 1903, leaving five children who survived her of whom two were the appointees under the deed of appointment of 1901—namely, the defendants Cuthbert Camm and Mrs. Evelyn Arden Vaughan Morgan (formerly Mrs. Nelson), and two others were Reginald P. J. Camm and Alfred R. McLean Camm, since deceased.

The question raised by the originating summons was whether, upon the true construction of the deed of appointment of January 19, 1901, and in the events which happened, the appointments made under that deed in favour of the defendants Cuthbert Camm and Mrs. Evelyn Arden Vaughan Morgan of shares in the property settled by the will of the testator carried the fee simple or other absolute interest therein or life interests only in such shares.

F. McMullan for the plaintiffs, the trustees of the testator's will.

E. M. Winterbotham for the defendant Cuthbert Camm. The actual decision in *In re Bostock's Settlement* (1) does not apply to the present case. That case did not decide that in every grant of an equitable estate in land there must necessarily be legal words of limitation in order to pass the fee simple. In the absence of words which in the limitation of a legal estate in land would pass the fee simple, it is a question of intention to be gathered from the context whether the grantor or appointor intended to pass the fee simple interest or an interest less than the fee simple: *In re Thursby's Settlement* (1) and *In re Nutt's Settlement* (2), which covers the present case. The three members of the Court of Appeal in *In re Bostock's Settlement* (3) recognized that there might be cases in which the intention shown by the instrument must govern, and quoted with approval the proposition stated in Lewin on Trusts, 13th ed., p. 75, para. 2. In *Land Purchase Trustee Northern Ireland* v. *Beers* (4) Andrews L.J. based his judgment upon that statement in Lewin on Trusts which had received the approval of the English Court of Appeal.

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(1) [1921] 2 Ch. 469, 489.

[The following were also referred to: Sugden on Powers, 8th ed., p. 441; Farwell on Powers, 3rd ed., p. 314, para. 57; *Holliday* v. *Overton* (5); *Lucas* v. *Brandreth* (*No.* 2) (6); *Tatham* v. *Vernon* (7); *Pugh* v. *Drew* (8); *In re Whiston's Settlement* (9); *Dearberg* v. *Letchford* (10); *In re Hudson* (11); *In re Tringham's Trusts* (12); *In re Irwin* (13); *In re Oliver's Settlement* (14); *In re Monckton's Settlement* (15); *In re Lewal's Settlement Trusts* (16).]

Cyril Radcliffe for the defendant Mrs. Evelyn A. Vaughan Morgan. The effect of the appointment contained in the deed of 1901 was to pass the fee simple to Mrs. Vaughan Morgan in one-fourth of the two-thirds of the hereditaments then left unappointed. Strict conveyancing terms are not used in that deed in the limitation of the estate; the word used is "absolutely." When the limitation of an equitable estate in land is framed in strict conveyancing language,

(1) [1910] 2 Ch. 181.
(2) [1915] 2 Ch. 431.
(3) [1921] 2 Ch. 469, 489.
(4) [1925] N. I. Rep. 191.
(5) (1852) 15 Beav. 480.
(6) (1860) 28 Beav. 274.
(7) (1861) 29 Beav. 604.
(8) (1869) 17 W. R. 988.
(9) [1894] 1 Ch. 661.
(10) (1895) 72 L. T. 489.
(11) (1895) 72 L. T. 892.
(12) [1904] 2 Ch. 487.
(13) [1904] 2 Ch. 752.
(14) [1905] 1 Ch. 191.
(15) [1913] 2 Ch. 636, 642.
(16) [1918] 2 Ch. 391.

evidence of the intention of the grantor or appointor as to the quantum of the interest passing by the instrument is not admissible; but, if such terms are not used and the limitation is expressed in untechnical or popular language, it is permissible to show from the context of the instrument what quantum of interest the grantor or appointor intended should pass. Apart from the question whether, in construing the appointment, it may be read as part of the will conferring the power and not as subject to the rules of construction applicable to deeds, the appointment here is but a direction to the trustees of the will, who have the fee simple estate, as to the manner in which they are to carry out their trust. The case falls within the first of the three cases put by Younger L.J. in *In re Bostock's Settlement* (1)—namely, within the principle of *Pugh* v. *Drew.* (2)

The statement by Sargant J. in *In re Monckton's Settlement* (3) of the principle applicable to the case of an executed document under which an equitable estate is limited, as that statement is quoted by Younger L.J. in *In re Bostock's Settlement* (4), seems too wide, for Sargant J. qualified that statement later in his judgment (5) when he said: " an executed limitation of an equitable estate must ' prima facie ' be read in the same sense and with the same result as a limitation of a legal estate." Here, untechnical, popular language is used in limiting the quantum of the interest intended to be passed by the appointor, and according to the views expressed by all the Lords Justices composing the Court of Appeal in *In re Bostock's Settlement* (4) and on the authority of *Land Purchase Trustee Northern Ireland* v. *Beers* (6), in which the Bostock case was explained, it is legitimate to discover what was the intention of the appointor in making the appointment of January 19, 1901.

L. F. Mumford for the trustees of the settlement of the share of Reginald P. J. Camm. This is a case of an equitable limitation by way of trust executed and, as was decided in

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(1) [1921] 2 Ch. 469, 489.
(2) (1869) 17 W. R. 988.
(3) [1913] 2 Ch. 636, 642.
(4) [1921] 2 Ch. 469, 490.
(5) [1913] 2 Ch. 636, 643.
(6) [1925] N. I. Rep. 191.

In re Whiston's Settlement (1), such a limitation now bears the same construction as a legal limitation. As Warrington L.J. said in *In re Bostock's Settlement* (2): "A more liberal construction may be given to a will than to a settlement. In a deed the Court is confined to the actual limitations:" see also Lewin on Trusts, 13th ed., p. 75, para. 2. The deed of appointment of 1901 is framed in formal conveyancing language, and the limitation must be construed strictly. The limitation is to the appointees "absolutely," a word which is technically applicable to limit the interest in the trust funds and property mentioned in the appointment the income of which was by the will of the testator given to the appointor and is no part of the limitation of the estate in the hereditaments, with the result that the appointor having used a technical term in limiting the interest in the personal estate, the two appointees take life interests only in the hereditaments, a result which is consistent with the decision in *In re Bostock's Settlement.* (2)

H. O. Danckwerts for the personal representatives of Alfred R. Camm deceased, another son of Mrs. Camm. The statement by Sargant J. in *In re Monckton's Settlement* (3) quoted with approval by Younger L.J. in *In re Bostock's Settlement* (2) is correct. The stricter modern rule is that "an equitable limitation by way of trust executed has the same construction as a legal limitation" and is the rule now to be applied: per Chitty J. in *In re Whiston's Settlement* (4); *In re Irwin* (5); Sugden on Powers, 8th ed., p. 441. In *In re Thursby's Settlement* (6) Farwell J. said that he did not think that an appointment of an equitable interest in land to A. without words of limitation could carry more than a life interest to the appointee.

[Hawkins on Wills, 3rd ed., ch. xii., p. 168, also was referred to.]

CLAUSON J. [stated the facts as above set forth and the question to be decided, and continued:] The point of the case, of course, is that in the deed of appointment of January 19, 1901, which I have read, it will be observed that, although there is a recital that the lady is desirous of appointing the residue remaining unappointed and although she appoints to the daughter and the son in certain shares absolutely, there are no words of limitation phrased in strict conveyancing language after the names of the two respective appointees.

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(1) [1894] 1 Ch. 661.
(2) [1921] 2 Ch. 469, 472, 490.
(3) [1913] 2 Ch. 636, 642.
(4) [1894] 1 Ch. 661, 663.
(5) [1904] 2 Ch. 752.
(6) [1910] 2 Ch. 181, 188, 189.

On the construction of that deed of appointment it is, in my judgment, true to say, having regard, first, to the recital that the appointor is desirous of appointing the residue remaining unappointed of the hereditaments among Evelyn Nelson and Cuthbert Camm, and, secondly, to the presence of the word " absolutely " in the clause of appointment—a word which seems to me to refer to the share appointed to Evelyn Nelson as well as to the share appointed to Cuthbert Camm—that the intention is clearly disclosed of appointing one-fourth of the previously unappointed hereditaments to Evelyn Nelson in fee simple, and three-fourths to Cuthbert Camm in fee simple.

If the word " absolutely " did not appear in the instrument of appointment, I should have to hold that the appointment seeks to create equitable interests in Evelyn Nelson and Cuthbert Camm in the hereditaments by the use of strict conveyancing language with a definite meaning, with the result that I should have to hold that Mrs. Nelson and Mr. Camm take life interests only in the shares so appointed.

I can draw no distinction between the words with which I should (on the hypothesis of omitting the word " absolutely ") have to deal, and the words dealt with by the Court of Appeal in *In re Bostock's Settlement* (1), which words were " in trust for the child or children of the said William Bostock now born or hereafter to be born who shall attain the age of 21 years and if more than one in equal shares as tenants in common." However, in the case which I have to decide, the word " absolutely " is present and, consequently, the appointment is expressed in language which is not strict

(1) [1921] 2 Ch. 469.

conveyancing language with a definite legal meaning. The clause must be taken as a whole. It would not, in my view, be right to disregard the word "absolutely" and to hold that, as the word has no operation in strict conveyancing language, it must be discarded with the result that strict conveyancing language having been used, this case is covered by the actual decision in *In re Bostock's Settlement* (1) and the two appointees take life interests only in the said hereditaments. If I were so to hold, I should, in my view, be misreading the clause. The presence of the word "absolutely" in the clause shows that the clause is not framed in strict conveyancing language, and it is, so far as this Court is concerned, conclusively settled by the decision of the Court of Appeal in *In re Bostock's Settlement* (1) that, where strict conveyancing language is not employed, it is sufficient that the instrument should disclose, as a matter of construction, a clear intention as to the quantum of the interest which is intended to be given. This view is expressed, as I read the report, by Lord Sterndale M.R. (2) and by Warrington L.J. (3); and Younger L.J. (4) bases the conclusion at which the Court arrives in that case on the fact that the clause in question before the Court is expressed, as he says, in the language of legal limitations.

In the case of *Land Purchase Trustee Northern Ireland* v. *Beers* (5) the Court of Appeal in Northern Ireland appear to take the same view of the law as settled in *In re Bostock's Settlement* (1) as I have expressed above. They held, in a case in which the clause in question before them contained no technical words in conflict with the expressed intention, that they were free to treat the language used as sufficient to create, in untechnical language, the equitable estates intended.

In the view that I take of the matter, it becomes unnecessary for me to consider whether the strict rules governing the operation of a deed creating an equitable estate of its own

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(1) [1921] 2 Ch. 469.
(2) Ibid. 480.
(3) [1921] 2 Ch. 483.
(4) Ibid. 490.
(5) [1925] N. I. Rep. 191.

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force necessarily apply to a deed which operates merely, by way of appointment, to delimit interests created by an antecedent will and thus draws its operative effect from the will which created the power of appointment.

It is proper that I should add that in view of the date of the deed with which I have had to deal, s. 60 of the Law of Property Act, 1925, has no bearing on the matter.

Solicitors: *Johnson, Peacock, Hepworth & Chowne; Lawrence, Graham & Co.; Lovell, Son & Pitfield.*

H. C. H.

FARWELL J.
1934
Nov. 12.

In re W. T. POTTS.

Ex parte EPSTEIN *v.* THE TRUSTEE AND THE BANKRUPT.

[No. 432 of 1933.]

Bankruptcy—Taxation of Costs—Three Creditors represented by same Solicitors at application to approve a scheme of composition—Separate Counsel for each—Leading Counsel engaged for one—Disallowance of costs of leading Counsel—Objections to Taxation—Taxing Master exercised discretion wrongly.

A debtor commenced an action against three creditors, who were represented by the same solicitors, and on the hearing of an application to approve a scheme of composition separate counsel were engaged for each. The position of one of the creditors, if the scheme had been approved, would have been far more serious than that of the other two, and the solicitors engaged a leading counsel to appear for him. The application was dismissed, and the registrar ordered that the costs of the proceedings be taxed and paid out of the bankrupt's estate. The taxing master, being of opinion that there should be no discrimination between the three creditors, disallowed the whole of the costs incurred in briefing leading counsel:—

Held, that the taxing master ought to have considered the position of each creditor separately and, in the circumstances of the case, have allowed the costs of briefing leading counsel.

BANKRUPTCY MOTION.

The facts are summarized in the head-note and appear from the judgment.

R. W. Turnbull for the application. The position of Epstein was very different from, and far more serious than, the position of the foreign company or Kayton. It was only reasonable that leading counsel should have been briefed to appear for him and the costs of briefing leading counsel should have been allowed by the taxing master.

[He cited *Friend* v. *Solly* (1) and *Hallows* v. *Fernie*. (2)]

FARWELL J. This is a motion by one Epstein in the bankruptcy of William Thomas Potts asking " That the objections of the applicant, dated the 2nd of July, 1934, to the taxation of costs under the order of Mr. Registrar Mellor, dated the 1st of May, 1934, may be allowed and that it may be referred back to the taxing master to vary his certificate accordingly."

The story is a complicated one, but I must refer to it in some little detail, because, in order to arrive at a just conclusion in a case of this kind, it is essential that all the circumstances should be considered, and it is impossible to come to a proper conclusion without appreciating exactly what the true position is.

In 1929 Epstein, in partnership with one Kayton, was carrying on business under the style or name of The Anglo Belgian Oil Company. In 1930 Epstein, on behalf of his business, obtained the sole agency in Great Britain for the sale of the products of a foreign company. In 1932 Kayton became ill, and he ceased to take any active part in the business as from that date. The bankrupt appears about that date to have come upon the scene, in connection with these matters.

There was an agreement between the firm, Anglo Belgian Oil Company, and the bankrupt, in connection with the agency of the foreign company. That agreement, which was made in June, 1932, provided that the bankrupt should take over the agency which the Anglo Belgian Company

(1) (1847) 10 Beav. 329. (2) (1867) 17 L. T. 347.

had got from the foreign company in consideration of his indemnifying Epstein and Kayton against all liabilities. Subsequently in January, 1933, the foreign company obtained judgment against the bankrupt for the sum of 750*l.*, and on April 28, 1933, they issued a bankruptcy petition against him. On April 7, 1933, a creditor of the Anglo Belgian Oil Company, a man called George obtained judgment for 800*l.* against Epstein and Kayton. They brought in the bankrupt by a third party notice, and obtained judgment for that amount against him.

On May 16, 1933, the bankrupt issued a writ against the foreign company, Epstein and Kayton, claiming damages for fraud in connection with the agreement, and some 8000*l.* was claimed by him against them in that action.

Subsequently there was an application by the bankrupt for the approval of a scheme of arrangement, which was rejected, and on July 5, 1933, a receiving order was made on the petition of the foreign company. That receiving order was made after a long hearing before Mr. Registrar Mellor in which the bankrupt took the objection that no receiving order ought to be made on the petition of the foreign company, on the ground that this action was pending in which he was claiming very heavy damages for fraud.

The whole matter was very fully gone into before Mr. Registrar Mellor, and finally the receiving order was made, Mr. Registrar Mellor being satisfied that there was no foundation, as against the foreign company, for these charges of fraud.

The bankrupt appealed from that order, and on July 25, 1933, the appeal was dismissed. So that the position so far as the foreign company was concerned was that the whole question of the relationship between the bankrupt and the foreign company had been fully considered before the learned registrar. He came to a conclusion which absolved the foreign company from the serious charges of fraud against them and made the receiving order accordingly, and that order was affirmed by the Court of Appeal.

On December 5, 1933, the bankrupt delivered the statement of claim in the action. In March of 1934 the bankrupt put forward for sanction the second proposal for a scheme. Now it was obvious that if the scheme was sanctioned, the position of Epstein might be one of very considerable difficulty, because the action against the foreign company and Epstein and Kayton was still on foot, and it would still have been open to the bankrupt to prosecute that action, and it might have resulted in the bankrupt being ordered to pay the costs of it, and not being in a position to pay them.

It was obviously a matter of the utmost importance, from Epstein's point of view, that if any scheme of arrangement was to be sanctioned, it should be upon terms which would put an end to the claim of the bankrupt against him in respect of these charges of fraud.

The position of the foreign company and of Kayton was rather different from that of Epstein ; so far as Kayton was concerned, he had been out of all business during the critical time when these fraudulent acts were said to have been done, and it was thought that so far as he was concerned, it would be impossible to prove any case against him, having regard to the fact that he was ill, and had practically retired from the business altogether at that time.

So far as the foreign company was concerned they had the advantage of having a decision by Mr. Registrar Mellor, affirmed by the Court of Appeal, which did, so far as it went, clear them from any such charges.

In those circumstances, when the proposal for a second scheme came before the learned registrar, the solicitors who were acting both for Epstein and for the foreign company and for Kayton came to the conclusion that for the proper protection of their three clients respectively, they should be each represented by separate counsel.

That that was a wise step to take I have no doubt at all. Obviously, although in some measure the positions of these three parties were the same, in other ways there was a most material difference between them ; and I have no doubt that the solicitors were perfectly right, in order to protect their clients adequately, in briefing one counsel for each of the three persons concerned.

That was not a matter to which the learned taxing master thought objection should be taken. He had some doubt whether he was right to allow three counsel for the three separate parties, but he ultimately did, and no question arises on that.

The matter came before Mr. Registrar Mellor and was opened; there were notices given to examine and cross-examine witnesses, and the whole matter would have had to be gone into most thoroughly; the position of Epstein would have had to be made perfectly plain, and the charges of fraud against him would necessarily have had to be considered in some detail by the learned registrar, because Epstein's attitude was that unless these charges—unless the action which was pending against him in the King's Bench Division was settled—and no further charges of that kind made against him, it was not right that this scheme should be permitted to go through, because it would leave him in the unfortunate position of having to fight an action against a person who would have no, or might have no, means whatever to pay the costs if he ultimately succeeded. There being these very serious charges of fraud against him, the solicitors thought it right to brief leading counsel on his behalf.

Leading counsel were not briefed for the other two, their position being in some important respects different from that of Epstein, in that, so far as the foreign company was concerned, the matter had been already threshed out and dealt with before the learned registrar in the earlier proceedings, and because, so far as Kayton was concerned, he would almost certainly be able to satisfy any tribunal that he had no part in the alleged fraud.

In those circumstances, the solicitors thought it right to brief leading counsel on behalf of Epstein, but as it happened, the bankrupt was unable on the second day to find the money necessary to enable the proceedings to go forward. That being so, the application failed, and on May 3, 1934, the bankrupt was adjudicated bankrupt and a trustee was appointed. The costs of the proceedings before the learned registrar were ordered to be taxed and paid out of the bankrupt's estate.

On that taxation the learned taxing master thought it right to disallow the whole of the costs incurred in briefing leading counsel on behalf of Epstein on the application before the learned registrar.

This motion is directed to the trustee in bankruptcy of Potts. He does not appear here to-day and therefore I must deal with the matter on the case as stated by Mr. Turnbull and as it appears upon the documents before me.

The question which I have to determine is whether, in the circumstances of this case, the taxing master was right in disallowing the proper fees for leading counsel or whether he misconceived the position and ought to have allowed them.

I have read the objections and the master's answers. A matter of this kind is prima facie one for the discretion of the taxing master, and this Court is very slow indeed to interfere with the exercise of that discretion, and, indeed, in my judgment this Court ought not to interfere, unless it has reason to think that the taxing master, in exercising his discretion, has acted upon some wrong principle or upon some misunderstanding of the true position.

The taxing master in his answer to objections has made reference to two cases; one, *Friend* v. *Solly* (1), is an authority for the proposition that the number of counsel to be allowed is prima facie a matter in the discretion of the taxing master. That no one can dispute. The other, *Hallows* v. *Fernie* (2), is a case in which the fees of leading counsel were not allowed on taxation, where there had been examination and cross-examination of witnesses on commission.

With great respect to the taxing master it does not seem to me that the second of those cases has any real bearing on the matter at all. No one suggests that merely because witnesses have to be examined and cross-examined that that alone is sufficient in every case to justify the employment of leading counsel: that would be a ridiculous suggestion, and I cannot think that any one would venture to put it forward. The truth of the matter is that each case must depend upon its own facts, and in order to see whether the employment of

(1) 10 Beav. 329. (2) 17 L. T. 347.

leading counsel is justified or not, one has to consider the whole of the facts, remembering always that leading counsel may be a luxury for which an opponent, or the estate of a bankrupt, should not be made to pay, and that, on the other hand, in some cases the employment of leading counsel may be a proper precaution to take, in order to ensure that the case of the person in question may be fully and properly presented to the Court, and that the Court may have every assistance possible in a difficult case in arriving at a proper conclusion.

As I read the taxing master's answers to objections, he seems to have been much influenced in the view which he took by the fact that leading counsel were not employed on behalf of Kayton or the foreign company. In my judgment that is a wrong point of view. The fact that those two persons were not represented by leading counsel is no reason for deciding that Epstein was not justified in being so represented. Their position, as I have already pointed out, was not the same as that of Epstein, and in my judgment it was the duty of the taxing master to consider the position of each of the parties separately, and irrespective of the fact that one or other had or had not employed leading counsel.

In my judgment the taxing master has proceeded, so far as he has permitted himself to be influenced by that consideration, on a wrong basis. He should have disregarded the fact that Kayton and the other creditor were only represented by junior counsel, and should have considered the position of Epstein apart from them.

He also appears, as I read the answers to objections, to have taken the view that this was a matter in which leading counsel was quite unnecessary, and merely a luxury which was not required for the proper protection of Epstein or for the assistance of the Court.

Again, in that regard, I am unable to accept the view of the taxing master. One has to consider in a case of this kind not merely that this is an application to approve a scheme before the registrar in bankruptcy, which although it may involve some examination and cross-examination of witnesses is not prima facie a matter in which leading counsel are likely to be

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required, but one has to review the whole position in order to see precisely what the interests of the parties are, and how complicated the matter is from the point of view of the learned registrar. And viewing the matter in that light, having regard to the serious charges of fraud which were pending against Epstein, to the fact that the sanctioning of the scheme might seriously prejudice his position, and to the fact that the matter was so complicated as to entitle the registrar to all proper assistance, I have come to the conclusion that the taxing master exercised his discretion wrongly in this case, and that he should have allowed the proper costs of briefing leading counsel.

The order which I make is that the matter must go back to the taxing master in order that he may vary his certificate, on the footing that the fees of leading counsel should have been allowed in taxing the costs.

Solicitors for the applicant: *Cohen & Cohen.*

P. J. B.

In re SAMUELS.

Ex parte THE TRUSTEE *v.* J. H. S. TEE, TRADING AS TEE BROTHERS AND COMPANY.

FARWELL J.

1934

Dec. 3, 4.

[No. 107 of 1932.]

Bankruptcy — Judgment Debtor—Execution levied — Withdrawal of Sheriff—Right of Re-entry reserved—Arrangement between Debtor and Creditor—Sums paid under—Subsequent Receiving Order on Petition of Debtor—Execution incomplete—" Benefit of Execution " —Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 40.

A judgment creditor having seized a debtor's goods under a writ of fi. fa., an arrangement was come to between the judgment creditor and the debtor in order to avoid a sale. In pursuance of that arrangement the sheriff withdrew, reserving a right of re-entry. Under the arrangement the debtor paid various sums to the judgment creditor in part payment of the debt and in satisfaction of the sheriff's fees. Subsequently the debtor filed his own petition and a receiving order was made against him. At

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the date of the receiving order the debt had not been paid in full and the sheriff had the power of re-entry:—

Held, that the sums paid by the debtor before the date of the receiving order were not for the "benefit of execution" within the meaning of s. 40 of the Bankruptcy Act, 1914, and that the judgment creditor was entitled to retain them as against the trustee in bankruptcy.

In re T. H. Godwin, ante, p. 213, applied.

BANKRUPTCY MOTION.

This was a motion by the trustee in bankruptcy asking for: (1.) a declaration that two sums of 200*l.* each and sums of 100*l.*, 50*l.*, 90*l.* and 100*l.* paid by the bankrupt to the respondent, a judgment creditor, on various dates before the act of bankruptcy, formed part of the property of the bankrupt; and (2.) an order upon the respondent to pay those sums, amounting in all to 740*l.*, to the appellant.

The facts are fully set forth in the judgment.

W. N. Stable for the applicant. The facts in this case are similar to those in *In re T. H. Godwin* (1), but in that case the debts had all been paid and the sheriff had withdrawn, without reserving any right of re-entry, some time before the date of the bankruptcy, whereas in the present case the debts had not been fully paid and the sheriff had reserved the right of re-entry. The execution, therefore, was not complete, and the sums received by the respondent were, within the meaning of s. 40 of the Bankruptcy Act, 1914, benefits of the execution for which he was liable to account to the trustee: *In re Brelsford* (2); *In re P. E. & B. E. Kern* (3); and *In re Ford.* (4)

[He also cited *Ex parte Brooke* (5); *Stock* v. *Holland.* (6)]

G. F. Kingham for the respondent. The sums paid to the respondent were paid under an agreement between the bankrupt and the respondent, and were not benefits of the execution within s. 40: *In re Fairley* (7) and *Bower* v. *Hett.* (8) *In re T. H. Godwin* (1) applies, and the respondent is not liable to the applicant for the sums he has received.

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(1) Ante, p. 213.
(2) [1932] 1 Ch. 24.
(3) [1932] 1 Ch. 555.
(4) [1900] 1 Q. B. 264.
(5) (1874) L. R. 9 Ch. 301.
(6) (1874) L. R. 9 Ex. 147.
(7) [1922] 2 Ch. 791.
(8) [1895] 2 Q. B. 51.

FARWELL J. The circumstances which give rise to this question are somewhat complicated. Before I come to the facts relating to these transactions it will be convenient to say that the receiving order in this case was made on January 28, 1932, the bankrupt having presented his own petition. The adjudication was on the same date. On February 10 of the same year the trustee was appointed. The facts relating to these various sums are these: on March 10, 1931, the respondent issued a writ against the bankrupt for a sum of 1141*l.* 2*s.* 3*d.*, being the balance due for goods sold and delivered. On May 12, 1931, an order was made in the action that the respondent be at liberty to sign final judgment against the bankrupt for the amount claimed on the writ and costs, including certain other costs, to be taxed if not agreed. The order further provided that judgment was not to be entered if the bankrupt paid the debt and costs by certain instalments. Those instalments were 250*l.* down, and the balance by 150*l.* per month as from the date of the order. If any instalment should be in arrear for more than seven days, then judgment was to be entered for the whole amount due at the date of default. The bankrupt further undertook to obtain the guarantee of his wife, or some other responsible person, guaranteeing payment in the event of any default of payment by him. There was no final judgment ever signed in that action. The order was a Master's order setting out the terms which I have mentioned. The 250*l.*, which was the sum to be paid down, was duly paid by the bankrupt and two instalments of 150*l.* each were paid at or about the due dates. On July 16 of the same year the respondent issued a further writ against the bankrupt, suing him in his trade name and claiming the sum of 208*l.* 16*s.* 4*d.*, being the price of goods sold and delivered. On August 6, 1931, the respondent recovered judgment in that action for 208*l.* 16*s.* 4*d.*, and 11*l.* costs. On that judgment the respondent issued execution on August 8 and the sheriff entered under a writ of fi. fa., but on or about August 12, that is very shortly after the sheriff entered, he withdrew from possession, as a result of an arrangement which was made between the bankrupt and the respondent. That arrangement was that the amount of the last-mentioned judgment and costs, namely, the 219*l.* 16*s.* 4*d.*; was to be added to the balance outstanding under the order dated May 12, and the monthly instalments increased from 150*l.* to 200*l.* As I have said, the sheriff went out of possession, but he reserved a power of re-entry under the writ. What precisely is the effect of the reservation of a power of re-entry is a matter which may be open to some doubt, but it seems reasonably plain that, at any rate, it operates to protect the sheriff and the creditor in the event of the sheriff re-entering under the original writ. On August 12, in part performance of the agreement, the bankrupt paid to the respondent an instalment of 200*l.*, together with a sum of 21*l.* 2*s.*, the costs of the execution and the sheriff's fees, so that the costs of the sheriff in connection with the original execution were paid by the debtor. Further payments were made; on September 18 the sum of 200*l.*, and on October 26 and 31 two further sums of 100*l.* and 50*l.* On November 28, the bankrupt having failed to keep up payment of the agreed instalments of 200*l.*, the respondent appropriated or, as it is suggested, purported to appropriate the whole of the instalments paid by the bankrupt up to that date in reduction of the original claim in respect of which there had been a Master's order, and he then sued the bankrupt and signed judgment against him for a sum of 72*l.* 2*s.* 8*d.*, made up of the balance of the debt after such appropriation and costs. It is said on behalf of the trustee that the respondent had no right to make the appropriation which he made, or purported to make, in respect of the sums so paid. I am unable to appreciate on what grounds it is suggested that the respondent was not entitled so to treat the money which he received. As a result of the arrangement which was made in August, 1931, there was nothing, so far as I can see, which prevented such appropriation. The fact that the money had been so treated by the respondent must have been known to the debtor, if not before, at any rate as soon as the respondent sued him for the balance of the debt under the order of May 12, because unless there had been such an appropriation there is no possible explanation of the claim for that particular sum. The respondent having obtained judgment for the *72l.* 2*s.* 8*d.*, on the same day a writ of fi fa. was issued and the sheriff entered under that writ. He also entered under the writ of August 8, in respect of which a power of re-entry had been reserved. On December 2 the sheriff went out of possession under both executions, reserving the right to re-enter. The arrangement under which the sheriff went out of possession was this: The bankrupt paid the respondent 90*l.*; 10*l.* 1*s.* of that was in respect of the sheriff's costs, and the balance, 79*l.* 19*s.*, was credited on account of the amounts due under the two judgments herein referred to. It is suggested, in an affidavit filed on behalf of the respondent, that the sum of 79*l.* was appropriated towards the original debt; but I do not think, having regard to the correspondence to which my attention has been called, that that is substantiated, and the money must be taken to have been paid and to have been received on account of both debts. On or about January 1, 1932, the bankrupt paid a further sum of 100*l.* on account of the two judgment debts, leaving a balance of 123*l.* 1*s.*, or thereabouts, outstanding and unsatisfied at the date of the bankruptcy. In those circumstances, the trustee claims that the two sums of 90*l.* and 100*l.* paid by the bankrupt to the respondent on December 2 and January 1 are the benefit of an incomplete execution, and that accordingly those sums are payable by the respondent to the trustee.

The question as to what is the meaning of the term "the benefit of the execution" as used in s. 40 of the Bankruptcy Act, 1914, has recently been considered and decided by the Divisional Court in *In re T. H. Godwin.* (1) Judgment was delivered on November 19 of this year. It is unnecessary for me to refer in any detail to that judgment; it is sufficient to say that in the judgment is to be found this statement (2): "We are satisfied that on the true construction of s. 45, sub-s. 1, of the Bankruptcy Act, 1883" (for this purpose there is no difference between that Act and the present Act) " 'the benefit of the execution' refers to the charge on the debtor's goods obtained by the execution creditor by the issue of his writ, and was not intended to include, and does not include, any payment which might have resulted directly or indirectly by reason of the writ having been issued." It is, however, right to say that the question of the effect of a right of re-entry being reserved was expressly left open, and, therefore, that decision may not be conclusive in this case. In my judgment, however, whatever may be the effect of reserving a right of re-entry, the sums of 90*l.* and 100*l.* in this case cannot be treated as being the benefit of the executions and therefore, repayable to the trustee. If and so far as the sum of 79*l.* 19*s.* could have been properly appropriated towards payment of the balance of the original debt, that debt, at any rate, would have been completely discharged, and the case to that extent would come within the decision of the Divisional Court and there could be no question of the benefit of the execution. But even if that be not so, and, as I say, I do not think the evidence is sufficient to satisfy me that there was any such appropriation, in my judgment a payment made to prevent a seizure and sale and to get rid of the execution in that way is not the benefit of the execution within the meaning of the words as used in s. 40 of the Act. Whatever the effect of reserving the right of re-entry may be, in my judgment a payment made to avoid an execution is not the benefit of the execution within the meaning of the Act. Mr. Stable, on behalf of the trustee, practically abandoned his claim to the very much larger sum which was asked for by the notice of motion and, in my judgment, having regard to the facts in this case, the trustee is not entitled to repayment of any of the sums in question, and accordingly the motion fails and must be dismissed with costs.

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(1) Ante, p. 213.

(2) Ante, pp. 213, 221.

Solicitor for the applicant: *J. N. Nabarro.*

Solicitors for the respondent: *Robbins, Olivey & Lake, for Sampson, Horner & Co., Bradford.*

P. J. B.

In re A DEBTOR.

Ex parte DEBTOR.

C. A.

1934

July 27.

[No. 523 of 1934.]

Bankruptcy—Practice—Bankruptcy Notice—Application to set aside—Affidavit setting up Cross Demand—Amount less than Judgment Debt—Duty of Registrar—Bankruptcy Rules, 1915, *rr.* 140, 141.

Rule 140, sub-r. 2, provides that there shall be endorsed on every bankruptcy notice an intimation to the debtor that if he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar.

Rule 141 provides that the filing of " such affidavit " shall operate as an application to set aside the bankruptcy notice and then states the procedure to be followed.

On May 25, 1934, judgment creditors for 2727*l.* issued a bankruptcy notice against the judgment debtor. On May 31 the debtor filed an affidavit in which he alleged that he had a cross demand for two sums amounting together to 1500*l.* The Registrar marked the application " Fix a day—Motion—No Stay," and appointed June 28 for the hearing. A stay having been refused, the act of bankruptcy became complete on June 4, and on June 5 the judgment creditors presented a bankruptcy petition founded on that act of bankruptcy. On June 21 the debtor's application was dismissed and on June 28 a receiving order was made. On appeal by the debtor:—

Held, that the receiving order was properly made; that there had been no compliance by the debtor with r. 140, as the affidavit on the face of it showed that the cross demand did not equal or exceed the amount of the judgment debt, and therefore that the procedure provided by r. 141 for dealing with a bankruptcy notice did not come into operation, and that the case must be treated as if no affidavit under r. 140 had in fact been filed.

Held, also, that the Registrar, if he thought, as he appeared to have done, that the affidavit did not satisfy r. 140, ought to have marked the application " Affidavit not sufficient—No case raised " and not to have taken seisin of the matter.

APPEAL from a receiving order made by Mr. Registrar Mellor on June 28, 1934.

On May 25, 1934, the judgment creditors issued a bankruptcy notice for the sum of 2727*l.* 13*s.* 5*d.* against the

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judgment debtor in respect of a final judgment obtained in the King's Bench Division dated December 8, 1926. The notice was duly served on May 28, 1934.

On May 31, 1934, the judgment debtor filed an application for a stay of the bankruptcy notice. In his affidavit in support he stated: "I have a cross demand which I could not set in the action or other proceedings in which the said order was obtained. The said cross demand is for repayment of sums already paid under the said judgment plus the balance of the contract price (850*l.*) less costs and 650*l.* the amount subsequently defined of the plaintiffs' loss or damages under the guarantee I was held by the said judgment to have given."

On the same day on which that affidavit was filed with the Court the Registrar read the affidavit and marked the application "Fix a day—Motion—No Stay." Thereupon June 21, 1934, was fixed for the hearing of the judgment debtor's application. The Registrar having refused a stay the act of bankruptcy became complete on June 4, 1934.

On June 5, 1934, the judgment creditors presented a petition in bankruptcy founded on the above act of bankruptcy, notwithstanding that the judgment debtor's application alleging a cross demand was not to be heard until June 21, 1934. The petition was appointed to be heard on June 28, 1934.

On June 21, 1934, the judgment debtor's application was dismissed with costs and on June 28, 1934, a receiving order was made.

The debtor appealed against the receiving order. The appeal was heard on July 27, 1934.

The debtor appeared in person and contended that the Registrar did not fully hear him on his application of May 31, 1934, that in so far as his case was heard the Registrar misdirected himself, and that on the weight of the evidence the creditors' petition ought to be rejected.

Hon. H. L. Parker for the respondents was not called upon.

Lord Hanworth M.R. This appeal fails. When one has got to the bottom of it, one understands what has happened, although at first sight it would look as if a serious slip had been made. The fact is that a bankruptcy notice in respect of a sum of 2727*l.* 13*s.* 5*d.* was issued on May 25 against the present debtor. That bankruptcy notice contained the usual words that execution had not been stayed at the present time upon it, "and you must settle up that money or you must secure or compound for the said sum to the satisfaction of the agents of the plaintiffs or to the satisfaction of this Court, or you must satisfy this Court that you have a counterclaim, set-off, or cross demand against them which equals or exceeds the sum claimed by them, and which you could not set up in the action or other proceedings on which the judgment or order was obtained." Now, that was served upon the debtor, who replied to it by making an affidavit which he filed on May 31, 1934.

The filing of an affidavit for the purpose of an application to set aside a bankruptcy notice, if the affidavit is one which complies with r. 140 of the Bankruptcy Rules, 1915, is to be treated as notice of an application to set aside the notice, and then the procedure under r. 141 follows. That rule is mandatory and clear. It says this: "The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for the hearing of the application, and not less than three days before the day so fixed shall give notice thereof both to the debtor and the creditor, and their respective solicitors, if known. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined."

Now, just recalling the dates in the present case, they are these: The bankruptcy notice was dated May 25, 1934. In accordance with that notice, the act of bankruptcy would have been complete on June 4. There was an affidavit deposited by the debtor on May 31. That was before June 4, when the act of bankruptcy would be complete; but an indication was given that the hearing of the matter about which the affidavit had been deposited would be upon June 21. That being so, there ought to have been an order that there should be a stay until after the hearing on June 21, for the act of bankruptcy becoming complete on June 4, it was quite obvious that some step was necessary to safeguard the debtor's position from becoming a bankrupt between June 4 and June 21, the act of bankruptcy being, of course, a taint which involved serious consequences to the debtor.

What was done by the learned Registrar was this: upon this application he marked his initials to show that it had been received on May 31 and then said "Fix a day," and the day so fixed was this June 21; but he added "No Stay." Now, if there was to be a hearing, if there was sufficient material to put r. 141 into operation, which from this note it would appear that the Registrar thought there was by his saying "Fix a day," then it was not right to refuse a stay, which ought to be given in accordance with the latter part of r. 141.

The application was dealt with on June 21, and no order satisfactory to the debtor was made on that date. The appellant complains that there was no stay granted, and although there was a day fixed for the hearing, inasmuch as no stay was granted, r. 141 was not complied with. That is so; but the real question is this: Did r. 141 ever come into operation? The answer is "No," because it is only to come into operation on the filing of "*such* affidavit," namely one which complied with r. 140.

Rule 140 says that there must be "a counterclaim, set-off, or cross demand," and one which he could not have set up in the action in which the judgment or order was obtained. The affidavit that the applicant did make, when one comes to look at it, was one in which he claimed two sums as still due to him, namely, 850*l.* and 650*l.*; but even putting those together, making 1500*l.*, they do not countervail the total sum of 2727*l.*

More than that, the questions that he raises in his affidavit are matters which concern the judgment, or are antecedent to the judgment, and there is no sufficient indication that those matters could not have been raised, or ought not to have been raised, in the action in which the judgment was obtained.

Finally, in reference to those allegations, to which perhaps a benevolent construction might have been given in some cases, there was the additional allegation made which reflects upon the whole case, para. 8 of the affidavit of May 31, 1934, being of this nature: "The contract on which the said judgment or order was made against me was entered into by me under the duress of the War was for war material and it is opposed to any conception of justice that a private individual should be compelled by his Government"—this being a departmental debt—" (who have remitted the War debts of enemies and foreigners and have ceased payment of their own War debts) to pay a War debt of the nature of the present judgment or order to the ruin of the private individual and the destitution of his wife and children." Of course, the question of State debts payable to foreign countries and the like has no relevance whatever to these proceedings, and para. 8 casts a reflection upon the substance of the affidavit. It is quite obvious that the learned Registrar did think that the affidavit was one which did not comply with r. 140, and, if so, I think he ought to have said: "Affidavit not sufficient. No case raised," and not have purported to comply with one part of r. 141 and not with the other, the truth being that in the view that he took, r. 141 had not come into play at all.

When one has got the facts straightened out, it appears that in effect the order was right; but I should like to call the attention of the Registrar to the great importance of fulfilling the terms of r. 141, which is directly intended to safeguard the right of a debtor to be heard upon matters which he may reasonably and justly raise in answer to the very serious demand which is made upon him by a bankruptcy notice. The appeal is dismissed with costs.

Slesser L.J. I agree, but in so far as the reasons for

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A DEBTOR, *In re.*
DEBTOR, *Ex parte.*
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my agreeing that this appeal should be dismissed must not be taken to be in entire approval of what the Registrar has done in this case, I think it right to state why I have come to that conclusion.

Rule 141 deals with the filing of a certain class of affidavit: "The filing of such affidavit shall operate as an application to set aside the bankruptcy notice," and that rule therefore throws one back to r. 140, where the class of affidavit which brings r. 141 into operation is set out. By sub-r. 2 it is set out in the form of describing what must be endorsed on the bankruptcy notice: "There shall also be indorsed on every bankruptcy notice an intimation to the debtor that if he has a counter claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must, within the time specified in the notice file an affidavit to that effect with the Registrar."

It is, therefore, necessary that the affidavit in question should, on the face of it, show a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained. The affidavit in this case consists of three parts: first, a criticism of the judgment itself and certain relief sought under that judgment; secondly, a general criticism about public policy, which I need not discuss; and, thirdly, it does contain a cross demand for a certain sum; and if that sum there demanded was one within the meaning of the rule, it would have been the duty of the Registrar properly to have heard the debtor on the subject; but the cross demand, when it is examined, turns out to be for two sums, 850*l.* and 650*l.*, making 1500*l.* together, and as the judgment debt was 2727*l.* 13*s.* 5*d.* it cannot on any view be said to be a claim equalling or exceeding the amount of the judgment debt. This the subject-matter of the affidavit never came within the rule at all, and therefore—and here I differ respectfully from the learned Registrar—the Registrar ought never to have taken seisin of the matter, because he was dealing with an affidavit which was no affidavit within the rule. Having taken seisin of it, he ought to have heard the application; but, as I say, I think the reason why this appeal fails is because the appellant never made an affidavit which brought him within the rule at all, and therefore there was no matter which the Registrar ought to consider.

ROMER L.J. I agree.

Appeal dismissed.

Solicitor for respondents: *Treasury Solicitor.*

W. I. C.

In re A DEBTOR.

Ex parte DEBTOR.

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Jan. 18.

[No. 591 of 1934.]

Bankruptcy—Petition by Moneylenders—Facts to be stated—Duty of Court to see that requirements of Bankruptcy Act and Rules and Moneylenders Act, 1927, *have been complied with—Duty of Registrar to supply Court of Appeal with full note of proceedings before him showing that this has been done—Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 2*—Bankruptcy Rules,* 1915, *r.* 171*—Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 10.

Bankruptcy being a matter which affects not only the debtor and his creditors but also the general public, a duty is imposed upon the Court to see that all the requirements of the Bankruptcy Act, 1914, and rules have been observed.

Where therefore a petition in bankruptcy is presented by moneylenders it is the duty of the Registrar before making a receiving order to satisfy himself that all the requirements of s. 5, sub-s. 2, of the Bankruptcy Act, 1914, r. 171 of the Bankruptcy Rules, 1915, and s. 10 of the Moneylenders Act, 1927, have been complied with. Admission or consent by any one of the parties that this has been done is not sufficient. On an appeal the Registrar should furnish the Court of Appeal with a full note of the proceedings before him showing that these requirements have not been overlooked.

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A DEBTOR, *In re.*
DEBTOR, *Ex parte.*

APPEAL from a receiving order made by Mr. Registrar Warmington on December 4, 1934.

G. F. Kingham for the debtor, on the case being called on, asked for leave to withdraw the appeal, as the debtor proposed to apply to rescind the receiving order on payment in full of all his debts. He asked that in the meantime there should be a stay of the advertisements.

[LORD HANWORTH M.R. You must tell us something about the case.]

G. F. Kingham then stated the facts, which sufficiently appear from the judgment of the Master of the Rolls, and referred to *Mills Conduit Investment, Ld.* v. *Leslie.* (1)

Tindale Davis for the petitioning creditors. The receiving order was properly made. The petition, so far as the debts are concerned, is limited to the principal sums and interest at 5 per cent. That is all that the petitioning creditors, who are moneylenders, can at present petition for. The debtor admits that there is a debt of 130*l.* due to the Dunn Trust, Ld., and that is sufficient to support the petition. All that the Court has to find is that there is a good petitioning debt for 50*l.* payable in præsenti or at some certain future time: *In re a Debtor.* (2) Here the Registrar, having two debts each for over 50*l.*, had no alternative but to make the receiving order.

[He also referred to *In re Pitchford* (3) ; *In re Raatz.* (4)]

[LORD HANWORTH M.R. All that the debtor asks for is that there should be a stay of all advertisements.]

I leave that matter entirely in the hands of the Court.

G. F. Kingham in reply. I ask for a stay for twenty-one days.

[LORD HANWORTH M.R. We will grant a stay for twenty-one days provided that the debtor files a statement of his affairs within seven days.]

LORD HANWORTH M.R. In connection with this matter it is by no means clear that certain important principles of the Bankruptcy Court have been duly observed. It is necessary to state a few facts. The debtor failed to comply with the bankruptcy notice which had been issued by a creditor who was different from the petitioning creditors who were the respondents to the appeal. He had committed this act of bankruptcy, and the respondents to the appeal took advantage of that fact by presenting a petition in bankruptcy on June 21 of last year. Now the petition that is presented is one which states facts, but facts to which in our opinion very important additions ought to have been made. The petition is presented by two creditors, Louis Sherwood and the Dunn Trust, Ld., in respect of the sum of 1683*l.* 14*s.* With regard to the Sherwood claim, there was an aggregate sum of 1156*l.* 2*s.* 10*d.* that was due for a principal sum of 1150*l.* advanced and interest at 5 per cent., and there was also some further interest, that is, interest under s. 9, sub-s. 1, of the Moneylenders Act, 1927, for the sum of 160*l.* 2*s.* 2*d.*, which was recoverable in bankruptcy only if all the other creditors had been paid in full. It was interest at the rate of 60 per cent. With regard to the Dunn Trust, Ld., the claim was for a sum of 527*l.* 11*s.* 2*d.* advanced, with 5 per cent. interest, and there was a postponed claim in respect of interest payable at 240 per cent. per annum.

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(1) [1932] 1 K. B. 233.
(2) [1917] 2 K. B. 60.
(3) [1924] 2 Ch. 260.
(4) [1897] 2 Q. B. 80.

Now, in addition to those facts, it ought to have been made clear to the Court that with regard to the portion of the sum of 1156*l.* judgment had been given by the Master for 580*l.* and 5*l.* 8*s.* 4*d.* There was leave to defend as to the rest, and there had been a stay of execution in respect of the 580*l.* for which judgment had been given. The matter went before du Parcq J., who confirmed the order of the Master, and granted a stay of execution until an appeal to the Court of Appeal, and that appeal was not determined until July 26, 1934.

With regard to the Dunn Trust, Ld., in which there was a judgment, there was a contest in the case; the sum for which judgment was given was 130*l.* and no more. Therefore, as the facts stood, on the day when the petition was presented, namely, June 21, the position was this: that although there were these claims made by these two petitioning creditors, the total amount for which at that time there was an available debt was 130*l.* and no more due to the Dunn Trust, Ld. More than that, it would appear from a statement made, that in both cases the matters arose out of transactions in which provision was made for the payment of interest at a sum exceeding 48 per cent., and therefore requiring the duty of the Court to be exercised in accordance with s. 10 of the Moneylenders Act, 1927. That is a duty which belongs to the Court and cannot be evaded by any admission or consent which is given by any one of the parties. That is made clear in *Mills Conduit Investment, Ld.* v. *Leslie* (1), and I desire to restate the observations which were made in the judgment given by the Court: "The consent of the parties cannot relax the duty or lessen the powers of the Court. . . . . Although the parties have made their own agreement, it is still the duty of the Court to observe, respect, and carry out the direction in s. 10, and to presume that in this case the interest is excessive and the transaction harsh and unconscionable, until the contrary is proved." And by the effect of the Act of 1900 and the Act of 1927 the Bankruptcy Court is charged with the duty of respecting and carrying out the terms of the Moneylenders Act, 1927.

When the matter went before the Registrar, as it did on July 17, the stay of execution in respect of the whole of the claim of Louis Sherwood was still effective, and the only debt which at that time was available was this sum of 130*l.* due to the Dunn Trust, Ld. We have a note which seems imperfect; the note of the Registrar is this: "The debt and act of bankruptcy admitted, attendance of petitioning creditors dispensed with."

It may be that that note was made only for the Registrar's own purpose and without thought of making a record for the Court of Appeal; but it is not a very useful record when produced here. In all cases the Court would want to be satisfied that the terms of s. 5, sub-s. 2, of the Bankruptcy Act, 1914, have not been overlooked, that section saying that: "At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition."

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(1) [1932] 1 K. B. 233, 239.

And r. 171 of the Bankruptcy Rules, 1915, carries out the terms of s. 5, sub-s. 2, because it provides that "On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved. . . . ."

Now, I have specifically called attention to these rules, because on July 13 there was filed a notice to dispute, and that notice to dispute in terms stated that there was a stay of execution in respect of the Louis Sherwood debt, and that with regard to the Dunn Trust, Ld., only 130*l.* was due. Inasmuch as the note is not perfect I will say no more, but I do call the attention of the Registrar and of all other persons to the importance of observing and complying with s. 5, sub-s. 2, and r. 171, and of making a note that they have been complied with. I also call attention to the fact that an admission is not sufficient in bankruptcy proceedings; the Court is acting not merely inter partes but in the public interest, and that being so the Court has a public function and duty to perform and is bound to perform it.

There was an adjournment until July 31. By that time an order had been made in the Court of Appeal dismissing the appeal in the Louis Sherwood case, with the consequence that the stay of execution came to an end. The notice of opposition was withdrawn: what exactly that means I do not know. It may have been sufficient for the Registrar to advise himself, but inasmuch as these cases are not to be decided inter partes, we should have liked to have a more precise record of what was intended. After that there are adjournments made, I suppose in consequence of some suggestions now recorded in an affidavit, that the debtor would be able, if certain ventures in which he was

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engaged ended satisfactorily, to pay. We are told that the true facts, that is to say, the additional facts in respect of these two debts, were stated to the Registrar and that he was informed of them. Again, I think it would have been more useful if the note had contained a statement that that information had been given.

The matter was further adjourned on different dates, and finally until December 24, when the situation, so far as one could see, had not changed, and the receiving order was made. From that receiving order an appeal was brought before this Court, and Mr. Kingham, acting for the debtor, was anxious to withdraw the appeal and only asked for a stay of the advertisement.

Having regard to the matters which were revealed in the course of this petition we were not satisfied to accede to that application without a further investigation. I hope that in future attention will be drawn to the importance both of proof of the debt and to a more ample and complete statement being made of the exact situation in respect of matters which are before another Court, and that attention will be given to the question whether the duty of the Bankruptcy Court in respect of the Moneylenders Act has or has not been complied with. Now that the matter has been cleared up I think there is no sufficient ground for interfering with the Registrar's decision, and the appeal must be dismissed.

ROMER L.J. I agree.

MAUGHAM L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *P. W. Bullock.*
Solicitors for respondents: *Woolfe & Woolfe.*

W. I. C.

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[1933. F. 1483.]

Will—No provision enabling trustees to charge for services—Appointment of new Trustee—Appointment of trust corporation as sole managing trustee and sole custodian trustee—No power to charge fees as custodian trustee—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 2, 4.

Being desirous of retiring, the sole surviving trustee under a will, which gave trustees no power to charge for their services, by deed dated May 31, 1932, appointed a bank to be (*a*) managing trustee and (*b*) custodian trustee, with a view to enabling the bank to charge fees as custodian trustee under s. 4, sub-s. 3, of the Public Trustee Act, 1906 :—

Held, that the bank was not entitled so to charge. Either the deed of appointment operated to appoint the bank an ordinary trustee or it was inoperative as an attempt to do the impossible by appointing the same single body to hold the divided positions of managing trustee and custodian trustee.

Decision of Bennett J. (ante, p. 83) reversed.

APPEAL from a decision of Bennett J. (1)

Philip Ziegler made his will on March 8, 1879, and died on September 16, 1880. The will contained no power for any trustee to charge for his services as trustee. On May 31, 1932, T. P. Ziegler, a son of the testator, was the sole trustee of the will, and, being desirous of retiring, by a deed of appointment of that date appointed the defendant Williams Deacon's Bank Ld. trustee. The deed contained the following operative provisions :—

" (1.) In exercise of the power for the purposes conferred by the Trustee Act, 1925, and by the Public Trustee Act, 1906, and of all other powers him hereunto enabling the present trustee hereby appoints the bank to be (*a*) sole managing trustee of the said will in the place of the present trustee and (*b*) custodian trustee of the will.

(2.) The bank while acting as trustee of the said will will be treated not only as managing trustee but separately as custodian trustee with such functions duties and powers as appertain to a custodian trustee under s. 4 of the Public

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(1) Ante. p. 83.

Trustee Act, 1906, and may act as such managing trustee and custodian trustee respectively by its proper officer or officers.

(3.) The bank while acting as custodian trustee of the said will shall be entitled to receive by way of remuneration for its services as such trustee out of the property subject to the trusts of the said will such fees as would for the time being be chargeable by the Public Trustee if he were custodian trustee of the said will.

(4.) The bank hereby consents to act as sole managing trustee and as custodian trustee of the said will."

The plaintiffs, who were two of the beneficiaries under the will, brought an action against the bank for a declaration that it was not entitled to any remuneration, whether out of the capital or the income of the trust property for acting as trustees.

Bennett J. said the plaintiffs contended that under the Public Trustee Act, 1906, it was intended that when a custodian trustee was appointed there should be another person or persons to act as managing trustee. It was quite true that s. 4 of the Act was framed on this view, but it was clear that the Public Trustee, while holding the appointment of custodian trustee, could also be a managing trustee with other persons acting with him as managing trustees; and if he were so appointed and those who were acting with him as managing trustees ceased for any reason to do so, there was nothing in the Act to prohibit the Public Trustee from continuing to act as managing trustee while retaining the position of custodian trustee. It did not seem therefore to be the result of the language of s. 4 that there must always be some person or persons associated with the Public Trustee as managing trustees to enable the Public Trustee also to act as custodian trustee. That being so, he saw no reason for implying such a prohibition against a banking or insurance corporation qualified to act as custodian trustee, or a prohibition disentitling them to receive the remuneration to which the Public Trustee would be entitled in accordance with s. 4, sub-s. 3.

The plaintiffs appealed. The appeal was heard on February 6, 1935.

W. P. Spens K.C. and *A. Guest Mathews* for the appellants. The bank is not entitled to fees for acting as a custodian trustee as a result of the deed of appointment dated May 31, 1932. Sect. 36 of the Trustee Act, 1925, gives power to appoint new trustees, and by s. 37, sub-s. 1 (*c*), except when only one trustee is originally appointed, a trustee shall not be discharged from his trust "unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust." A trust corporation is defined in s. 68, sub-s. 18. "Trust corporation" includes a corporation "entitled by rules made under sub-s. 3 of s. four of the Public Trustee Act, 1906, to act as custodian trustee." By r. 30 of the Public Trustee Rules, 1912, as amended by the Public Trustee (Custodian Trustee) Rules, 1926, corporations entitled to act as custodian trustees are defined and they include this bank. The Trustee Act, 1925, s. 42, provides that "where the court appoints a corporation, other than the Public Trustee, to be a trustee . . . . , the court may authorize the corporation to charge such remuneration for its services as trustee as the court may think fit." Prima facie therefore it was not competent to Mr. Ziegler on his appointing the bank to be trustee to allow the bank any remuneration. What was done was really a device to try to get round s. 42 by appointing the bank separately as custodian trustee and so giving power to charge, as provided in s. 4, sub-s. 3, of the Public Trustee Act, 1906, the same fees as the Public Trustee could have charged if appointed custodian trustee. But the same person cannot be appointed managing trustee and custodian trustee. The provisions of s. 4 of the Act of 1906 indicate clearly that a custodian trustee is to be entirely separate from the managing trustees. Thus in s. 4, sub-s. 2 (*g*), it is provided that in determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee is not to be reckoned as a trustee. So too in sub-s. 2 (*b*) the trustees other than the custodian trustee are defined as the managing trustees, and s. 4, sub-s. 2 (*a*), (*b*) and (*c*), show how distinct the duties of managing trustees and the custodian trustee are. The whole idea is that the custodian trustee is to be the watchdog of the trust. Here the bank had the full powers of ordinary trustees vested in it and that is in truth the result of the deed of appointment. The bank is not therefore entitled to remuneration because s. 42 of the Trustee Act, 1925, is not complied with.

Sir Herbert Cunliffe K.C. and *John Bennett* for the bank. The only issue in this action is whether the bank is entitled to charge fees for acting as custodian trustee. It was not alleged in the pleadings that the same person could not be appointed managing trustee and custodian trustee. As far as the Public Trustee is concerned, s. 2 of the Act of 1906 provides that he can act as custodian trustee and ordinary trustee, and in the Public Trustee (Fees) Order, 1926, it is contemplated that the Public Trustee may be both a managing trustee and a custodian trustee in regard to the same trust.

[CLAUSON J. This is a fees order made by the Treasury with the approval of the Lord Chancellor and no inference can be drawn from it as to the construction of the Act.]

Sect. 4, sub-s. 3, of the Act in effect applies to the bank as a trust corporation provisions as to a custodian trustee applicable to the Public Trustee; and if the Public Trustee can hold the capacities of managing trustee and custodian trustee, the same must hold in regard to the bank. But even if it were true that the Act always contemplated that there should be a different person to act as managing trustee that would not invalidate the bank's appointment as custodian trustee and deprive it of the right to fees for acting in this capacity.

[LORD HANWORTH M.R. May not the effect of the deed of 1932 be to appoint the bank to be an ordinary trustee?]

The deed does not purport to appoint the bank to be an ordinary trustee. There is a separate appointment to be managing trustee and custodian trustee and even if the appointment to be managing trustee is invalid this does not deprive the bank of its right to act and charge as custodian trustee.

Spens K.C. replied.

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LORD HANWORTH M.R. This case raises an intricate point which depends on the careful consideration of a number of sections in an Act of Parliament. The facts are not in dispute. Mr. Philip Ziegler made a will on March 8, 1879, by which he bequeathed his residuary personal estate to executors and trustees on trust for sale and conversion. Subject to a life interest, he gave a portion to his daughter, Mrs. Lily Forster, and to her daughter, Mrs. Sinelnikoff. They are the plaintiffs. Mr. Philip Ziegler died on September 16, 1880, and probate of his will was obtained on January 6, 1881. The ordinary sequence of events happened. The life interest of the wife fell in, and on May 31, 1932, for the purpose of carrying out the remaining trusts of the will it became desirable that a new trustee should be appointed. At that time Mr. Theodore Philip Ziegler, a son of the testator, was the sole surviving trustee. He wished to be discharged from the trusts of the will and to appoint the defendant bank as sole managing trustee, and also as custodian trustee. Accordingly, on May 31, 1932, a deed was executed which recited that it was intended that the stocks, funds, and securities particularized in the schedule thereto should forthwith be transferred by the present trustee into the sole name of the bank as custodian trustee. [His Lordship then read clauses 1, 2 and 3 of the deed and continued :] The effect of the deed is to discharge Mr. Theodore Philip Ziegler from his trust and to give the duties of managing trustee and custodian trustee to the defendant bank. It will be noticed from the words which I have read that no effort is made to allow the bank to make any charge other than for remuneration for its services as custodian trustee of the will, and that is for reasons which will appear later.

There appear to have been unhappy differences in what, after all, is a family trust. It is unnecessary to go into them, but in consequence of them, on October 4, 1933, the plaintiffs brought this action against the bank claiming a declaration that the bank is not entitled to any remuneration, whether out of the capital or the income of the trust property, for acting as trustee, and if and so far as may be necessary, that the trusts of the will may be carried into execution by the Court with all proper accounts and inquiries. What the plaintiffs say is this: that it was improper to make such an appointment as the last surviving trustee purported to make, and ineffective to allow the bank to charge a remuneration. In the defence the bank makes it plain that it is asking for the fees as custodian trustee, and no more. In paragraph 3 of the defence the bank says that it has a right to charge fees as custodian trustee, and denies that it has wrongfully charged or deducted fees against capital or income of the settled shares of the plaintiffs as alleged. The issue, therefore, is raised whether the bank is entitled to charge fees as custodian trustee, but there is involved for the purposes of the determination of that question a consideration of what was the effect of the appointment of the bank as a new trustee in succession to Mr. Theodore Philip Ziegler.

The matter stands in this way: it is provided by s. 37, sub-s. 1 (*c*), of the Trustee Act, 1925, that when it becomes necessary to appoint a trustee for the whole or any part of the trust property " it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust." For the purpose of that section the bank is a trust corporation, and the appointment was made accordingly. What is meant by a custodian trustee? What is the distinction which is drawn? A reference to the Public Trustee Act, 1906, will answer that question. By s. 2, sub-s. 1, of that Act: " Subject to and in accordance with the provisions of this Act and rules made thereunder, the public trustee may, if he thinks fit—(*a*) act in the administration of estates of small value; (*b*) act as custodian trustee; (*c*) act as an ordinary trustee." And provisions are made at greater length in the subsequent sections with regard to each of those positions. Sect. 3 deals with the administration of small estates—estates of which the gross capital value is proved to be less than 1000*l.* Sect. 4 deals with the position as custodian trustee. Sect. 5 deals with the powers of the Public Trustee as an ordinary trustee.

Sect. 4, which amplifies the powers and duties of custodian trustees, states in sub-s. 2: "Where the public trustee is appointed to be custodian trustee of any trust—(*a*) The trust property shall be transferred to the custodian trustee as if he were sole trustee . . . . ; (*b*) The management of the trust property and the exercise of any power or discretion exerciseable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees) ; (*c*) As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustee shall have free access thereto and be entitled to take copies thereof or extracts therefrom." Those passages make it plain what differentiates the two characters of custodian trustee and managing trustee, and how the duties of an ordinary trustee can be and are in certain cases split up into those two categories thus indicated. By cl. (*f*): "The power of appointing new trustees, when exerciseable by the trustees, shall be exerciseable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the court for the appointment of a new trustee as any other trustee." Clause (*g*) states: "In determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee." It is thus made plain that a person can be appointed to exercise the functions of a custodian trustee, and no more. Sub-s. 3 of s. 4, which enables payment to be made in respect of the duties performed as custodian trustee by a body corporate, such as the present bank states: "The provisions of this section shall apply in like manner as to the public trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee."

If, therefore, the bank can claim by cl. (*c*) of s. 4, sub-s. 1, that it is a custodian trustee, it is entitled to exercise the powers under sub-s. 3 and to require to be paid for services as custodian trustee. If its position is that it is a trustee without any limiting terms, the difficulty would arise, because in order to obtain remuneration the powers of s. 42 of the Trustee Act, 1925, would have to be invoked. That section says: "Where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorize the corporation to charge such remuneration for its services as trustee as the court may think fit." It will be seen, having regard to the terms of s. 4 of the Public Trustee Act, 1906—including sub-s. 3, which enables a charge to be made for services rendered as custodian trustee—why the bank relies on the fact that it is a custodian trustee and as such has not made, and does not claim to make, demand for anything more than it is entitled to retain as fees payable to a custodian trustee.

It is said, however, by the plaintiffs, that it is not a possible position for the bank to take up; that it is all very well for the bank to call itself a custodian trustee and to claim no more than a custodian trustee can claim, but that when one turns to the deed under which the bank was appointed, whatever its exact terms may be and however much it may purport to divide the duties into compartments, its effect and operation is to make the bank a trustee without any qualification at all. The bank is appointed sole managing trustee and custodian trustee. What then are its powers? They are the powers which are held by an ordinary trustee. Is it possible by the device—one might almost call it notation—of dividing up these two functions into A and B, to alter the character and duties and powers which are given to and passed on to the bank, and which operate to discharge the late trustee from any other responsibility? What is the effect of this appointment? It would seem that it may have to be treated as an effective appointment, and if it is an effective appointment it operates to make the bank a trustee *sans phrase*. On the other hand, if it sets out to do what cannot be done, it is inoperative, and the charge cannot be made because the deed is ineffective to give the rights to the bank as custodian trustee only.

I have only a word or two more to say on the Public Trustee Act, 1906. The structure and words of the Act indicate that the Public Trustee can have several different characteristic functions. He can, first of all, be appointed to act in the administration of small estates, and that gives him certain powers in relation to those estates which are very important. Secondly, he can undertake a lesser function than a complete trusteeship; he may be a custodian trustee, and that connotes the fact that there must be somebody who will be the managing trustee; or he may be appointed as an ordinary trustee, which is contemplated by s. 5. On examining the words of s. 4 and bearing in mind that the custodian trustee has a lesser function than an ordinary trustee, it is plain why it is necessary to put a number of clauses therein which enable the custodian trustee to act in difficulties which may arise either in relation to or under the direction of managing trustees, or where he may be faced with the fact that the managing trustees have ceased to be, by death or otherwise. That seems to indicate a clear distinction between a case where the Public Trustee is appointed only to hold the lesser office of custodian trustee and where he is appointed to hold the full office of an ordinary trustee, as he can be under s. 5.

In the present case it is unnecessary for us to determine whether or not we are to treat the deed of appointment of May 31, 1932, as wholly ineffective, or whether we are to treat it as effective but attempting to do what cannot be done. In either event it appears that the bank has not a right to act as custodian trustee only and to protect itself

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by saying it has the right to charge under s. 4, sub-s. 3, of the Act of 1906.

Although in what I have described as an intricate matter I differ with Bennett J. with hesitation and with some diffidence, yet I feel that the right course is to allow this appeal and to make the declaration asked for. The appeal must be allowed.

Maugham L.J. I am of the same opinion. The main question that arises is on the true construction of s. 4 of the Public Trustee Act, 1906, and I need not recapitulate the facts with which the Master of the Rolls has already dealt.

Sect. 4 of the Public Trustee Act, 1906, empowers the Public Trustee, with his consent, to hold what was a new position—namely, that of custodian trustee of any trust—and for the present purposes it is material to observe that he could be so appointed in any ordinary trust by the person having power to appoint new trustees. In sub-s. 2 of s. 4 there are a number of provisions to which I shall refer later. By sub-s. 3: "The provisions of this section shall apply in like manner as to the public trustee to any banking or insurance company or any other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee." It should, perhaps, be mentioned that by r. 30 of the Public Trustee Rules, 1912, as substituted by r. 1 of the Public Trustee (Custodian Trustee) Rules, 1926, the defendant bank in this case, having a capital in excess of the requirements mentioned in r. 30, sub-r. 1 (*b*), is a banking company entitled to act as custodian trustee. Putting that together with sub-s. 1 of s. 4 of the Act of 1906, we find that the person having the power to appoint new trustees—in this case Mr. Theodore Philip Ziegler, who purported to make the appointment by the deed of May 31, 1932—was empowered to appoint the bank as a custodian trustee.

The question emerges whether that power justified an appointment of the bank not merely as a custodian trustee but to hold what were described in the deed as two offices—namely, that of sole managing trustee of the will in place of Mr. T. P. Ziegler, the appointor, and also that of custodian trustee of the will. As the Master of the Rolls has pointed out, that is precisely the same as an appointment of the bank to be what the Act of 1906 in the heading to s. 5 describes as "an ordinary trustee," and the question may be defined as the question whether a person having the power under s. 4 to appoint a custodian trustee is entitled, in the case of a banking or insurance company which can by the rules act as trustee, to make a sort of dual appointment by which that company is appointed a custodian trustee with power to charge, and at the same time appointed as managing trustee, with the result that the totality of its position is absolutely indistinguishable from that of an ordinary trustee. Sect. 5 empowers the Public Trustee to be appointed a trustee, or, in the words of the title, an ordinary trustee, but we do not find any suggestion there that there is a power to appoint him to be a managing trustee in addition to his position as custodian trustee, and the truth of the matter and the common sense of it seem to me to be that a person who is both performing the duties of custodian trustee, as mentioned in s. 4, and performing all the other duties of an ordinary trustee is really no more than and no less than an ordinary trustee.

Sub-s. 2 of s. 4 contains, I think, sub-divisions which indicate the view of the Legislature that in every case where the Public Trustee is appointed to be the custodian trustee there will be other persons who are described in the section as the managing trustees. The first provision necessary to refer to is cl. (*b*) of s. 4, sub-s. 2, which provides: "The management of the trust property and the exercise of any power or discretion exerciseable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees)." So far as this section is concerned, it would seem clear that the intention of the Legislature was that the Public Trustee should be appointed as custodian trustee for the purposes of looking after the trust property as mentioned in sub-s. 2 (*a*), but that the management of the trust property and the exercise of powers and discretion must remain vested in somebody else—namely, any trustee other than the custodian trustee—and I can see some very good possible reasons for that so far as the appointment of a custodian trustee is concerned.

Clause (*g*) of s. 4, sub-s. 2, though not very strong on this point, at any rate tends in the same direction. It is in these terms: "In determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee." That has some weight in showing that the draftsman of the section was considering that the custodian trustee was outside the category of an ordinary trustee. Clause (*h*) is of considerable importance, It provides: "The custodian trustee, if he acts in good faith, shall not be liable for accepting as correct and acting upon the faith of any written statement by the managing trustees as to any birth, death, marriage . . . . or other matter of fact . . . . nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee." Here, again, I do not think the paragraph is conclusive, but it is obvious that if the custodian trustee is also appointed the managing trustee—the two offices being regarded as not coalescing for all purposes—the result will be that it will be impossible to obtain legal advice independently of the custodian trustee, because the two corporations or the two bodies will be one, and therefore the clause cannot, strictly speaking, apply.

Sect. 5 of the Act, to my mind, according to its general phraseology, implies that if the Public Trustee is appointed to be an ordinary trustee he is not in any true sense a custodian trustee; he is a trustee and nothing else. One of the points on which I think that the learned judge in the Court below based the conclusion to which he came was that the Public Trustee, while holding the appointment of custodian trustee, can also be a managing trustee with other persons acting with him. Assuming that that be the right view, it is a conclusion which depends on sub-s. 2 of s. 2 of the Act. That sub-section does not apply to a banking or insurance company or other body corporate which, by virtue of the provisions of sub-s. 3 of s. 4, might be appointed to be a custodian trustee. Accordingly, that argument seems to me to possess no weight in assisting one in coming to the conclusion that a trust corporation might be, in certain cases, both a custodian trustee and a managing trustee with other persons.

Looking at s. 4 alone and contrasting it with s. 5, under which the Public Trustee may be appointed an ordinary trustee, I come to the conclusion that there is no ground in the Act for holding that the persons named in sub-s. 3 of s. 4, or any trust corporation defined in another section, can properly be appointed to hold two separate offices which in truth are only one. I think if it was desired to appoint the bank to be a trustee there was no difficulty in making the appointment, and had it been desired to appoint the bank to be a custodian trustee there was no difficulty in doing it, with the result that as a custodian trustee it would have been entitled to charge, but I do not think that there is any authority under the Public Trustee Act, 1906, for making a purely artificial and unreal distinction between the two positions of custodian trustee and managing trustee for the purposes of enabling the bank to charge as custodian trustee, and, so far as I can see, for no other reason whatsoever.

The deed of appointment of May 31, 1932, purports to do something which the appointor T. P. Ziegler was not entitled to do—namely, while not appointing the bank to be an ordinary trustee in terms, to attempt to appoint him to the two positions which I have mentioned simply for the purpose of enabling the bank to charge.

For these reasons the appeal must be allowed, with the consequences mentioned by the Master of the Rolls.

CLAUSON J. I am of the same opinion, but because we differ from the learned judge in the Court below I desire to add a few words. In my judgment, on the construction

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of the Public Trustee Act, 1906, a custodian trustee discharges a special function which, by its very nature, is differentiated from the functions of the remaining trustees (in the Act called managing trustees) of a trust in which a custodian trustee has been appointed. The very existence of a custodian trustee implies that there are certain functions which he is not to discharge, but which are to be discharged, if discharged at all, by some other person or persons.

I now turn to the document by which it is said that the bank occupies the position which justifies it in claiming the remuneration of a custodian trustee. It was suggested, as I understood, that the effect of the deed might be, or was, to appoint the bank as custodian trustee and nothing more, but that construction of the deed seems to me to be impossible, for, in my view, the whole deed proceeds plainly on the footing that Mr. T. P. Ziegler, the appointor, ceased to be a trustee, and he would not cease to be a trustee if all that happened under the deed was that the bank became a custodian trustee. There are two other possible views of the operation of this deed. One is that it is wholly invalid in view of the fact that it attempts to appoint one person to two separate and incompatible offices. The other alternative view is that on its true construction it operates to appoint the bank as what in the heading to s. 5 of the Public Trustee Act, 1906, is spoken of as an "ordinary trustee." In my view, it is not necessary to decide which of those two views of the operation of the deed is correct, as in either view the bank could not properly claim the remuneration which it claims.

Solicitors: *C. S. Tomlinson; Routh, Stacey & Castle, for Orford & Sons, Manchester.*

H. C. G.

ELDERTON *v.* UNITED KINGDOM TOTALISATOR COMPANY, LIMITED.

EVE J.

1935

Jan. 18;
Feb. 6.

[1935. E. 70.]

Gaming—Football pool advertised in newspaper—Pool conducted by bookmaker on credit system—Whether a prize competition "for the forecast of the result of a future event"—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *ss.* 20, 26, 29.

A company whose only trade or business was that of a bookmaker as defined in Part I. of the Betting and Lotteries Act, 1934, advertised a "football pool" in a weekly newspaper. Readers were thereby invited to fill in coupons relating to any one or more of a series of football matches to be played on the following Saturday, with their respective forecasts of the results, including the score, and to stake a named sum thereon. Under the rules of the pool entrants were required on the day before the matches were played to remit the coupons they had filled up to the company with a promise in writing, duly signed, to pay the amount they were staking in case they lost, on the Tuesday following. The total amount received from entrants, less 10 per cent., was distributed by the company among those whose forecasts turned out to be correct, or most nearly correct. On a motion by the plaintiff, a director of the defendant company, for an injunction to restrain them from so conducting the pool:—

Held, that the pool was not a "competition in which prizes are offered for forecasts of the result . . . . of a future event" within the prohibition contained in s. 26 of the Betting and Lotteries Act, 1934, but a pari-mutuel or pool betting operation conducted by a bookmaker, and therefore lawful within s. 3 and the proviso to s. 26 of the Act.

Attorney-General v. *Luncheon and Sports Club, Ld.* [1929] A. C. 400 discussed and applied.

MOTION.

The plaintiff claimed an injunction to restrain the defendant company, its servants and agents, from conducting in or through a weekly newspaper called the Winner or any other newspaper, any competition in which prizes were offered for the forecast of the results of football matches, contrary to the prohibition contained in s. 26 of the Betting and Lotteries Act, 1934. (1)

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(1) "Sect. 26.—(1.) It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the

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The plaintiff was one of the directors of the defendant company, which was incorporated in 1930 to carry on the business of sporting accountants in football, horse-racing, dog-racing, and other branches of sport. The defendants advertised regularly in the Winner inviting members of the public to fill in forms predicting the results, with scores, of a selection from a series of football matches to be played on the following Saturday, and to fill in at the bottom of the form the stake proposed. There were six betting pools so advertised, for example "Pool No. 6. Forecast any 12 results from 61 matches." Each person entering was required to sign a form promising to remit £ . . . . being the total amount invested by him on the matches for the following Saturday and to abide by the printed rules and conditions. The standard rules were printed on the back of the forms supplied by the defendants. By Rule 1 all business was conducted on a credit basis, and through the post only. Lists containing investments were to be posted not later than the Friday before the day of the matches. Ready money would not be accepted, and any investment accompanied by cash would be void (as infringing the Football (Ready Money) Betting Act, 1920). Losing clients were to send on the following Monday, but not earlier, a remittance for the total amount lost, and any client who did not settle in the prescribed manner would be blacklisted. No commissions were accepted from

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sale of any article to the public—
(*a*) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known;
(*b*) any other competition success in which does not depend to a substantial degree upon the exercise of skill:
Provided that nothing in this subsection with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act.

Sect. 29. Where a person convicted of an offence under this Act is a body corporate, every person who at the date of the commission of the offence was a director or officer of the body corporate shall also be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge."

any defaulter, or any person under twenty-one years of age. The defendants, by Rule 13, guaranteed to pay to winning clients in each pool the whole of the promised moneys in that pool, less a commission of 10 per cent. and expenses at the company's discretion.

The company also advertised in the Winner a "goals points pool," in which competitors were not asked to predict results. The instructions were as follows: "Just make a × against the five matches which you think will produce the most goals." There was a list of 43 matches for competitors to select from. Fifty per cent. of the pool was to be paid to the competitor whose five matches totalled up more points than any other competitor, and the competitor who scored the lowest number of points was to receive a consolation prize of 5*l.* Claims to a share in this pool had to be sent in, with a remittance of the stakes on the Monday following the matches, and other conditions were according to the company's standard rules.

P. B. Morle for the plaintiff. This is a competition conducted through a newspaper in which prizes are offered for the forecast of a future event, and comes within the prohibition of s. 26 of the Betting and Lotteries Act, 1934. The newspaper advertises all the particulars of the competition with the rules and contains a coupon to be filled up and signed by those entering it, and also a claim form to be sent in by any one who claims to have won a prize. The entrants are pitting against each other the skill which they possess, and the newspaper treats them as competitors. The prize is none the less a prize because it is of uncertain amount, contributed by the unsuccessful contributors. The "goals points pool" advertised on the last page of the Winner is still more clearly a competition in which prizes are offered and not a betting pool, for those who enter are not required to predict results.

Beyfus K.C. and *R. F. Levy* for the defendants. This is not a prize competition, but the advertisement of a betting pool. There are restrictions on pool or pari-mutuel betting on race tracks in s. 3 of the Act, but they do not affect this case.

There is nothing in the Act to prohibit pool betting being carried on through a newspaper. Sect. 26 is aimed at competitions for prizes for forecasting a future event, such as the winner of the Derby, offered by newspapers. The person who operates a totalisator, or betting pool, does not offer prizes. The success of any entrant depends on the number of winners, and the number of losers. The method of operation of a betting pool is fully described by Lord Buckmaster in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1) That is what is done by the defendants here. The newspaper undertakes the receipt of the subscriptions, but does not conduct any competition.

The case is covered by the proviso to s. 26. It is a pool betting operation conducted by the defendants, whose sole trade or business is that of bookmakers.

The "goals points pool" advertised on the last page of the Winner may be a competition, as it is not a betting pool and offers prizes, including consolation prizes. The defendants undertake to withdraw this competition, and to advertise nothing but an ordinary betting pool.

P. B. Morle replied.

Cur. adv. vult.

1935. Feb. 6. EVE J. The plaintiff claims an injunction to restrain the defendant company, its servants and agents, from conducting in or through a newspaper called the Winner, or any other newspaper, any competition in which prizes are offered for forecasts of the results of football matches contrary to the provisions of s. 26 of the Betting and Lotteries Act, 1934.

The company, incorporated in 1930, is a bookmaker within the meaning of s. 20, sub-s. 1, of the Act, and the plaintiff, who alleges that the company's main activities constitute an offence under s. 26, is a director of the company and as such seriously involved by reason of the fact that by s. 29 of the

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(1) [1929] A. C. 400.

Act, where a person convicted of an offence under the Act is a body corporate every director of that body is also to be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge, and this the plaintiff does not suggest he can do. Sect. 26, Part II., of the Act deals with lotteries and prize competitions. So far as it is relevant on the present occasion it reads as follows. Sub-s. 1 says: "It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public—(*a*) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known; (*b*) any other competition success in which does not depend to a substantial degree upon the exercise of skill." Then follows a proviso, the construction and effect of which are not quite clear; but as the plaintiff's claim for an injunction is based on the allegation that the defendant company has conducted a competition in or through a newspaper it is not necessary on this occasion to inquire further as to the meaning and effect of the proviso, which it will be seen relates mainly to competitions conducted in connection with a trade or business. The proviso is as follows: "Provided that nothing in this subsection with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act." The particular operations to which the plaintiff takes exception and upon which the claim to an injunction is founded are two pools, the one known as the "United Kingdom Totalisator football pool No. 6," and the other as the "United Kingdom goals points pool." Both are conducted in or through the newspaper known as the Winner, and in the case of the second one, the "goals points pool," it is clearly a competition in which prizes are offered for forecasts of future events, including a consolation prize to the competitor who scores the lowest number of points. The defendants do not contend that this is not within s. 26, and they offer, and the plaintiff is ready to accept, an undertaking to discontinue operating or conducting this kind of pool in the future.

The arguments relating to the football pools call for some further consideration. In approaching this part of the case it must be noted that pari-mutuel, or pool betting, was recognized as an existing and lawful business when the Act was passed. It is one of the four classes of betting on which restrictions are imposed by the first four sections of the Act. The restrictions affecting this particular class of betting are to be found in s. 3 of the Act, and it is not suggested that the defendant company has in any way contravened any of the provisions of that section. According to the plaintiff's evidence, which is accepted as correct, the defendants' pools are conducted in the following manner: Coupons containing a list of a number of football matches then about to be played are published in the Winner newspaper, and members of the public are invited to fill up the coupons with their respective forecasts of the results of the said matches and with the amounts of their respective stakes thereon and to forward the coupons so filled up to the defendant company before the determination of the said results. Participants whose forecasts are proved by the results of the matches to be incorrect are required to, and do, forward the amount of their respective stakes to the defendant company upon a date specified in the advertisement, and the total amount invested by investors less 10 per cent. is distributed by the defendant company among those persons whose forecasts are proved to be correct. A copy of the newspaper for Monday, December 17 last, is in evidence (Exhibit "B") containing the advertisement of Pool 6 and the standard rules regulating the operations are to be found in Exhibit "C." The advertisements and rules are framed to keep the operation within the statutory restrictions imposed on this class of betting and to avoid everything in the nature of ready-money betting. The relationship established between the investors or clients who subscribe to the pool and the promoters or organizers, and also between the subscribers inter se, are to be found fully described and explained in the speeches of the learned Lords in the case of *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1) That was a case wherein the question was raised whether the participants were betting with the operating company or inter se, and in order to decide this question it was necessary to ascertain the procedure and the relationship thereby brought about between the investors in such a pool. The late Lord Buckmaster describes the course pursued by the would-be investor in the following language: "He"—that is the intending participant—"'operates' in the following manner In anticipation of a horse race he hands in to the clerk in charge of the machine a credit voucher numbered and dated, on which is placed the name of a horse with a space containing the words 'Win or Place,' the irrelevant word to be struck out or, if not struck out, the 'investment' is taken to be on 'win.' Thereupon the clerk in charge of the instrument makes the consequent alteration and the machine duly records the amount 'invested' on each horse, so that each investor can estimate what he will be likely to receive if his investment is successful by the following calculation: After 10 per cent. of the gross amount shown on the vouchers has been retained by the company 'in respect of the facilities provided' and expenses of management, the balance is divided among the investors on the winning horse in the proportion of their respective stakes. The winnings for each week are paid by the respondents from their own funds on every Saturday irrespective of any possible loss owing to dishonour of the vouchers. The respondents thus take the risk of bad debts but, owing to their control of membership, this is probably not serious, 2½ per cent. of the 10 per cent. being regarded by the respondents as sufficient security against such a contingency. Apart from this possible loss, the respondents can lose nothing on any race nor, apart from their 10 per cent., which is immutable, can they ever gain. This then is the respondents' position"—that is the Luncheon and Sports Club, Ld.—"in relation to the members of the pool:—They receive the vouchers ; they manipulate the machine ; they collect the money which the vouchers represent ; they distribute the moneys represented by the vouchers received ; they guarantee the honesty of the members, and they take a percentage for their pains." Then he deals with the rules of that particular pool, and on the opposite page he says : " What is the contract each member makes with the respondents ? It is nothing but this : in consideration of your providing me with the use of the machine, placing at my disposal the clerical assistance, undertaking to pay me if I win the money other members have promised me to pay and guaranteeing the amount, you shall have 10 per cent. of my stake." Then the learned Lord goes on to say : " In this I can see no trace of gaming or wagering with the respondents. To them the rise and fall of odds, the success or failure of a horse and all the hopes and hazards of the turf are completely immaterial. They can never lose except to the extent of discredited vouchers, and loss due to that act of dishonesty is itself independent of the race. Rowlatt J. and the Master of the Rolls, who alone decided in favour of the appellant, base their judgment on the view that the club are principals, but, even if this view were right, it does not follow they are principals in making bets." Then he says : " A bet is something staked to be lost or won on the result of a doubtful issue, but no doubtful issue affects the respondents—they neither win nor lose on any such chance. Nor does it seem to me that the test applied by both these learned judges ' that the winners look to the club and the club to the losers ' is a critical test of whether or no they made a bet. To guarantee the honesty of a gambler, though it may be taking a risk, is not making a bet." That judgment was concurred in by Lord Sumner, Viscount Dunedin and Lord Blanesburgh.

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(1) [1929] A. C. 400, 403, 405.

Such being the relations subsisting between the company and its clients and between the clients inter se, where does the plaintiff find any justification for asserting that those operations, perfectly legal under Part I. of the Act, are not part of the pool betting business regulated by s. 3 but are prize competitions within s. 26 ? If so, who are the competitors, what is the competition, and where are the prizes? It is true that in Rule 13 the word "prize" occurs, but that it will be seen is in connection with the goals points pool. The language used is: "In the points pool should the dividend for the second and third prize work out higher than that for the first and second prize respectively the awards will be adjusted at company's option," and in the paper Exhibit "B," para. 24, where the results of the goals points pool are tabulated, "competitors" are mentioned, and a statement is added that "Six competitors with five points share the consolation prize."

One does not compete with a man with whom a bet is made, nor does the winner regard the money paid by the loser as a prize. In my opinion there is nothing in the Act or in the rules or procedure to justify me in holding that in operating the football pools the defendant company is conducting any competition within the mischief of s. 26.

If the costs have not been provided for, the judgment, after reciting the agreement of the parties to treat the hearing of this motion as the trial and the undertaking given by the company in relation to the goals points pool, will dismiss the action with costs to be paid by the plaintiff except in so far as they have been increased by the claim in respect of the goals points pool. The excepted costs to be paid by the company, and there will be the usual set-off.

Solicitors: *Samuel Coleman; Percy Bono & Griffith.*

H. L. L.

FARWELL J.

1935

Jan. 22, 23.

In re BOYER.

NEATHERCOAT *v.* LAWRENCE.

[1931. B. 4988.]

Will—Construction—Gift to E. B. and F. B. for life and after the death of both to brothers and sisters of testatrix " or their heirs " as should be living at her death—Death of a sister surviving testatrix, but predeceasing her husband—Husband not " heir " to personal estate of wife.

A testatrix by her will gave 600*l.* upon trust for the benefit of E. B. and F. B. during their lives, and after the death of both of them she directed that the amount should be equally divided " among such and so many of my brothers and sisters or their heirs as shall be living at the time of my decease." E. N., a sister of the testatrix, survived the testatrix, but died in the lifetime of her husband:—

Held, that the husband of E. N. did not take as her heir.

Decision of Kindersley V.-C. in *In re Walton's Trust* (1), unreported, followed.

ADJOURNED SUMMONS.

This summons, taken out by the present trustee of the will of the testatrix, raised the question whether " heirs " meant: (1.) Next of kin according to the Statutes of Distribution; or (2.) Heirs at law; or some other and what persons.

By her will, dated April 13, 1868, the testatrix appointed an executor and trustee, and she directed that, after paying her debts, funeral and testamentary expenses, he was to invest 600*l.* and to pay the interest thereon upon trusts for the benefit of her natural children, Emma Boyer and Frederick Boyer, and after the death of both of them, the 600*l.* and any accumulation of interest arising therefrom was to be equally divided " among such and so many of my brothers and sisters or their heirs as shall be living at the time of my decease."

The testatrix died on April 17, 1868.

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(1) Decision of Kindersley V. C. reversed on another point in Court of Appeal (1856) 8 De G. M. & G. 173.

Frederick Boyer and Emma Boyer were both dead, Emma Boyer having died on March 18, 1930.

Emma Boyer, a sister of the testatrix, married Charles Frederick Nicole, and died intestate on November 10, 1871. No letters of administration of her estate were taken out. She left her surviving her husband and six children, one of whom was the defendant, Agnes Amelia Williams. Charles Frederick Nicole remarried, and died on November 18, 1907, leaving two children of his second marriage, one of whom was the defendant, Edwin Charles Nicole. By his will C. F. Nicole gave all his residuary estate to be equally divided among all his children.

Eliza Boyer, a sister of the testatrix, married George Coulson and died on May 5, 1894, having survived her husband. She had two children, Edward Alfred Coulson and Susan Lawrence. By her will she gave all her estate to Susan Lawrence, who died intestate on October 2, 1919, leaving three children, two of whom were the defendants, Emily Lawrence and Agnes Amelia Lawrence.

E. A. Coulson, the heir at law of Eliza Coulson, died on February 10, 1915. Letters of administration (with will) were granted to his son, Charles Edward Coulson, who died on January 22, 1926, intestate, leaving part of the estate unadministered, and letters of administration (with the will annexed) of the unadministered estate were granted to his daughter, the defendant Emma Jane Clifford.

The principal question that arose for decision on the hearing of the summons was whether C. F. Nicole, on the death of his wife, took her share of the 600*l.* as her heir and, therefore, whether all his children, by both his marriages, participated.

Eardley-Wilmot for the plaintiff.

Wilfrid Hunt for Edwin Charles Nicole. If this question were decided on principle, apart from authority, it is reasonably clear that the husband of a first taker would take. Persons who succeed on an intestacy to the personal estate of the first taker are the heirs of the personalty: *Gittings* v. *McDermott.* (1) It is beyond question that a wife takes.

(1) (1834) 2 Myl. & K. 69, 77.

It follows logically that a husband should, and it has been so held in a recent Irish case of *In re Cusin.* (1) C. F. Nicole, on the death of his wife, became entitled to her share, and his son, E. C. Nicole, now takes.

[He also cited *Keay* v. *Boulton.* (2)]

H. O. Danckwerts for A. A. Williams. There is a decision of Kindersley V.-C. in *In re Walton's Trust* (3), cited in *Doody* v. *Higgins* (4), that the husband, in the events that have happened here, does not take. The matter is treated as settled in Hawkins on Wills, Theobald on Wills, and Jarman on Wills. The Court is bound by the decision in *In re Walton's Trust.* (3)

FARWELL J. The question which I have to determine is whether under a gift to a person or his heirs, the words " or his heirs " include, or do not include, the husband of the first taker. I have already decided on a previous occasion in this case that the gift was a substitutionary gift and that the words " or his heirs " operate to give the personal estate to the persons who would have become entitled on the death intestate of the first taker to his or her personalty. That, however, does not conclude the question which I am now considering—namely, whether where the first taker was a married woman the persons entitled include her husband.

This matter has been considered to some extent in certain cases and it has been treated by the text writers as a matter which is now settled. I find in Hawkins on Wills, 2nd ed., p. 123, the rule stated in these terms : " A bequest of personal estate to 'A or his heirs' is construed as a gift by way of substitution to the heirs, in the event of the death of A before the period of distribution." Then he goes on: " And the word 'heirs' is held to mean the persons who would be entitled to the personal estate of A, by virtue of the Statutes of Distributions, if he had died intestate, including therefore a widow, but not including a husband." A statement to a similar effect is to be found in Jarman on Wills, 7th ed., pp. 1541, 1545. A similar statement up to the last edition, without any qualification, is to be found in Theobald on Wills; but in the 8th edition of Theobald at p. 369 there is a reference to an Irish case to which I shall have to refer in a moment.

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(1) [1917] 1 I. R. 63.

(2) (1883) 25 Ch. D. 212.

(3) Unreported.

(4) (1856) 2 K. & J. 729.

The question really is this: Do the persons who take by way of substitution mean the persons entitled on the death of the first taker as though the first taker had died intestate, that is, without any reference to the Statutes of Distribution at all but simply the persons who would take if he had died intestate, or do they mean the persons who take by virtue of the Statutes of Distribution, or do they mean the next of kin? Now if the words mean the next of kin that would exclude the widow, if the first taker was a married man, and I think it is quite plain that that is not the meaning which has been attributed to these words in any of the cases. There seems to be little doubt that a widow is one of the persons who is entitled to take under a gift of this sort, and she is entitled to take although there is imported into the gift a reference to the Statutes of Distribution; indeed she is one of the persons who takes by virtue of those Statutes. But in no case, if the words are to be treated as meaning next of kin or as meaning the persons who take under the Statutes of Distribution, can a husband participate if the first taker is a married woman, because the husband succeeds to his wife's property not as one of the next of kin, nor by virtue of the Statutes of Distribution, but by reason of his marital right. This being so, there appears to be some doubt whether the husband ought to be included or not. The principle upon which the Courts have acted in construing the word "heirs" in reference to personal estate seems to be this. The word "heirs" as referring to personal estate is not a very apt word. The Courts have said it can be given a proper and reasonable meaning by analogy to the use of the word in connection with real estate, and that therefore it can be taken to mean the persons who succeed to the personal estate of the first taker. Now if that be the ratio decidendi I find it a little difficult to see why it is necessary

FARWELL J.

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BOYER, *In re.* NEATHERCOAT *v.* LAWRENCE.

to import the Statutes of Distribution at all. I should have thought the logical conclusion would have been that the persons who take are the persons who are what Lord Brougham called in *Gittings* v. *McDermott* (1) the heirs of the personalty, that is to say the persons who succeed upon an intestacy to the personal estate of the first taker. But even if the Statutes of Distribution are not brought in there is still a difficulty in the way of the husband, because it may be said that although he may take his wife's personal property on her death intestate he does not succeed to it. He takes it not by way of succession but by his marital right. That would seem to be a somewhat artificial use of the word "succeed," because for all practical purposes, e.g., paying succession duty, he does succeed to his wife's property, and, had the matter been free from authority, I should have thought the proper conclusion to come to was that the husband was one of the persons who would be entitled to participate in a gift of this kind. But this matter is not free from authority, because, apart from the text-books, there is a case which appears to decide the point adversely to the husband, a case of *In re Walton's Trust.* (2) That was a decision of Kindersley V.-C. Unfortunately, the case is not reported, but it is referred to and cited by Wood V.-C. in *Doody* v. *Higgins.* (3) So far as I can gather from the reference to *In re Walton's Trust* (2) in Wood V.-C.'s judgment, Kindersley V.-C. decided two points: (1.) that the gift was substitutional; (2.) that the husband did not participate. That case went to the Court of Appeal (4), who reversed the decision on the first point and consequently did not have to consider the second point at all, and if that be so Kindersley V.-C.'s decision that the husband was not included in the class to take stands and is a direct authority on the point. That appears to have been the view of Wood V.-C. in *Doody* v. *Higgins* (3), because, having cited *In re Walton's Trust* (2), he adds this (5): "The husband does not take by succession,—he is not entitled under the Statutes of Distribution, but by virtue of his marital right—a right distinct from and paramount to the Statutes of Distribution." Under those circumstances I think it would not be right for me to decide in favour of the husband in a case of this kind, even though the statement by Wood V.-C. in *Doody* v. *Higgins* (1) is only dictum, since it appears to have been based on the decision in *In re Walton's Trust.* (2)

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(1) 2 Myl. & K. 69, 77.

(2) Unreported.

(3) 2 K. & J. 729, 734, 738.

(4) 8 De G. M. & G. 173.

(5) 2 K. & J. 729, 738.

The matter is not wholly free from authority the other way, because in a comparatively recent case in Ireland, Barton J. in *In re Cusin* (3) held that in a case of this kind a husband was entitled. Apparently *Doody* v. *Higgins* (4) was cited to him, but he does not make any express reference to it in his judgment. He says at the end of his judgment (5): "There was no serious dispute at the Bar except in the case of Sarah. In her case it was contended that under the word 'heirs' her share would pass to her next-of-kin; and passages were cited from several cases in which 'heirs' of personal property has been held to mean next-of-kin. But that is because the persons entitled to succeed to the personal property ab intestato were in those cases the next-of-kin. In the present case it is the husband who is so entitled. It is well settled that a widow, although not strictly a next-of-kin, takes her share in cases of this kind. Why should not a husband take, when he is the person who is entitled on his wife's death to her personal estate? I therefore hold that, in the events that have happened, S.'s husband is entitled to her share." If I may say so, with respect, I share the feeling of the learned judge in that case. Why should not a husband take when he is the person who is entitled on his wife's death to her personal estate? I appreciate, however, that it is not strictly accurate to say that a husband takes by succession, and if a substitutionary gift of this kind means either the persons who take by succession or the persons who are entitled under the Statutes of Distribution, in either case the husband is excluded. At any rate, I do not think under the circumstances

(1) 5 K. & J. 729, 738.

(2) Unreported.

(3) [1917] 1 I. R. 63.

(4) 2 K. & J. 729, 734, 738.

(5) [1917] 1 I. R. 63, 66.

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it is open to me to decide otherwise than in accordance with the view expressed by Wood V.-C., which appears to be founded upon the decision in *In re Walton's Trust.* (1) The Irish case is one which is not binding upon me, although, of course, I must treat it with every respect, and, as I say, had I thought the matter free from authority I should have been tempted to follow that decision. Under the circumstances I do not think it would be right for me so to decide, and, accordingly, I must hold that the husband is not entitled to participate.

Solicitors: *Sharpe, Pritchard & Co., for Wootten & Wallis, Cambridge*; *Finnis, Downey, Linnell & Chesshher.*

P. J. B.

FARWELL J.

1935

Jan. 24, 25.

In re BRINE AND DAVIES' CONTRACT.

[1934. B. No. 3556.]

Vendor and Purchaser—Possessory title—Contract to sell registered land without disclosure of the title being only possessory—First disclosure in abstract—Condition as to time of delivery of objections—Purchaser not bound to accept title—Not bound by condition.

When a vendor purports to sell registered freehold property without disclosing that his title is only possessory, which fact appears only on delivery of the abstract, the contract is misleading, and the purchaser can refuse to accept the title, notwithstanding a condition that, if objection be not taken within fourteen days of delivery of the abstract, he will be taken to have accepted the title.

ADJOURNED SUMMONS.

By a contract dated July 11, 1934, Archibald John Brine agreed to sell to Herbert Walter Davies a registered freehold house and premises formerly known as No. 74 Ivy Road, Old Southgate, in the county of Middlesex, then partially demolished, with the land adjoining shown upon the plan attached thereto, at the price of 330*l.* The property was sold subject to the conditions known as the National Conditions of Sale, 12th edition. The title was to consist of a copy of the original entries in the Land Registry and an authority to inspect the same. The date of completion was to be August 11, 1934.

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(1) Unreported.

An abstract of title with an authority to inspect the entries at the Land Registry was delivered to the purchaser's solicitors on July 12, 1934. From the abstract it appeared that the entries consisted of (1.) An entry dated July 8, 1933, showing that Alice Eliza Secle had been registered on that day as proprietor of the property with a possessory title, and (2.) An abstract of an agreement dated April 12, 1934, whereby the property was sold to the vendor at the price of 250*l.*

By section 2 of condition 4 of the National Conditions of Sale it is provided that: "The purchaser shall deliver his objections and requisitions (if any) in respect of the title and of all matters appearing on the abstract particulars or conditions of sale at the office of the vendor's solicitors within 14 days from the actual delivery of the abstract . . . . and in respect of such delivery of objections and requisitions time shall be of the essence of the contract . . . . and in default of such objections and requisitions (if any), and subject only to such (if any) the purchaser shall be deemed to have accepted the title."

Until the delivery of the abstract the purchaser had no knowledge that the vendor had only a possessory title, but had believed from the contract that he had an absolute title.

On August 8, 1934, the purchaser's solicitors wrote to the vendor's solicitors requiring to be supplied with the earlier title, as the possessory title was not sufficient. On the same day the vendor's solicitors replied that the vendor could not deduce any earlier title, but that, although the purchaser was out of his time for requisitions, they would without prejudice give a statutory declaration of twelve years' undisputed possession. The purchaser's solicitors refused to accept this and further correspondence ensued in which the vendor's solicitors claimed that as the purchaser had not delivered his requisitions within the prescribed time, he must under the conditions be held to have accepted the title, but they supplied the purchaser with a copy of the statutory declaration which was made when the title was registered at the Land Registry. This purported to show a possessory title for the preceding twenty-five years, and had been lodged at the Registry.

The purchaser's solicitors on September 8, 1934, wrote contending that this statutory declaration should have been delivered as part of the abstract, so that until such delivery the abstract was incomplete, and that condition 4 could not apply, but that in any event the purchaser was entitled to an absolute title under the contract. As the vendor did not take any proceedings to enforce specific performance of the contract the purchaser, on September 20, 1934, issued this summons asking for a declaration that the vendor had not shown a good title to the property in accordance with the contract, and for a return of the deposit.

T. K. Wigan (*R. R. Formoy* with him) for the purchaser. The purchaser was not supplied with a complete abstract until he received the statutory declaration and time would not begin to run till that time in any event. But the description of the registration title in the contract led the purchaser to believe that he was offered an absolute title, and the contract in this respect was misleading. The contract attempts to cut down our rights, and as to this see the observations of Fry J. in *In re Marsh & Earl Granville* (1) and of Cotton L.J. in the Court of Appeal. (2) That is an answer to the purchaser's suggestion that we should have made inquiries before entering into the contract. Under s. 110, sub-s. 2, of the Land Registration Act, 1925, the vendor is bound to supply the purchaser with such copies and evidence as to any rights on which the register is not conclusive.

C. R. D. Richmount for the vendor. The purchaser, not having made his objection within the specified time, must be taken to have accepted the title and cannot recover his deposit. He cannot claim that the abstract was defective.

(1) (1883) 24 Ch. D. 11, 15, 17, 23.

(2) Ibid. 23.

Although s. 110, sub-s. 2, of the Land Registration Act, 1925, provides that the vendor must supply certain copies where the register is not conclusive, such provision is made "subject to any stipulation to the contrary," and here special condition defines what title the vendor must show. That condition overrides s. 110, sub-s. 2. The abstract here was sufficient, and even if the title shown turns out to be faulty, the abstract is good according to the judgment in *Want* v. *Stallibrass.* (1) The condition here is wider than the condition was in that case. I have shown a title, and objection should have been made within fourteen days.

The purchaser says that had he known that only a possessory title was offered he would not have agreed to purchase. If that be so he should have objected within the time limited. He could have raised the point as soon as the abstract was delivered. If the Court should be against my contention, I submit that the purchaser is not entitled to costs on account of his delay in taking the objection: see *Upperton* v. *Nickolson* (2) and especially the judgment of James L.J. (3)

FARWELL J. [after stating the facts, continued:] The question to be decided is what is the true meaning of the contract. In my judgment any one reading it was entitled to assume that the abstract to be supplied would show an absolute title. If the vendor could give only a possessory title he should have stated that fact in the contract. He did not do so and consequently the contract is misleading since the vendor represented that he could give an absolute title on the register, whereas in fact he had only a possessory title. If that be so, the vendor must be taken to have contracted to sell property registered with an absolute title. The statutory declaration does not constitute such a title. In those circumstances is the vendor entitled to rely on the fact that the objection to title was not taken within the time stipulated? In my judgment he is not. The test in such a case is whether or not the Court in the circumstances would

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(1) (1873) L. R. 8 Ex. 175, 184.

(2) (1871) L. R. 6 Ch. 436.

(3) Ibid. 444.

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grant the vendor specific performance of the contract, and the answer to that question in my judgment is in the negative. The vendor here offers to the purchaser something substantially different from that which the purchaser contracted to purchase, and the vendor therefore cannot rely on "Condition 4." In the result the purchaser is entitled to the declaration which he seeks and the vendor must pay the cost of the summons.

Solicitors for plaintiff: *Hudson, Simmons & Co.*
Solicitors for defendant: *Saunders, Sobell, Greenburg & Co.*

E. K. C.

BENNETT J.
1935
Jan. 25, 28, 29.

In re YAGERPHONE, LIMITED.

[No. 00137 of 1933.]

Company—Winding-up—Debenture holder—Creditors—Fraudulent preference—Sum recovered from creditor by liquidator—Whether property of debenture holders or distributable among general creditors—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 265.

The joint liquidators in the voluntary winding-up of a company recovered a sum of money alleged to have been paid to a creditor by the company by way of fraudulent preference.

A debenture holder took out a summons in the liquidation for an order that the money recovered from the creditor should be paid to the receiver of the property charged by the debenture:—

Held, that the money did not become part of the general assets of the company, but was a sum of money received by the liquidators and impressed in their hands with a trust for those creditors among whom the assets of the company were distributable.

Ex parte Cooper (1875) L. R. 10 Ch. 510 and *Willmott* v. *London Celluloid Co.* (1886) 34 Ch. D. 147 distinguished.

SUMMONS.

The following facts are taken from his Lordship's judgment:—

This is a summons in the liquidation of Yagerphone, Ld., issued by H. Yager (London), Ld., in which the two liquidators of Yagerphone, Ld., are respondents, asking for an order that the liquidators do forthwith pay the sum of 240*l.* 11*s.* 2*d.* to the receiver appointed by the applicant of the property and assets of Yagerphone, Ld., comprised in and charged by a debenture issued by the company to the applicant on January 14, 1933, such sum of 240*l.* 11*s.* 2*d.* having been received by the liquidators on December 1, 1933—namely, after the appointment of the receiver and being or representing moneys subject to the charge contained in the debenture.

The debenture referred to in the summons was issued by Yagerphone, Ld., on January 14, 1933, in consideration of a loan of 2000*l.* made by the applicant H. Yager (London), Ld. By the debenture Yagerphone, Ld., acknowledged that it had received 2000*l.* and undertook that it would on demand or without any demand on the happening of any of the events thereinafter specified pay to the debenture holder all such sums as were then or should thereafter become owing to the debenture holder from the company and that the company would pay interest on any such sum by equal quarterly instalments.

The debenture provided that the principal moneys thereby secured should become immediately payable without any demand and on the happening of any of the following events: (*a*) if the company gave three months' notice in writing to the debenture holder of its intention to pay off this debenture; (*b*) if a distress or execution were levied or issued against any of the property of the company and were not paid out within seven days; (*c*) if an order were made or a resolution were passed for winding up the company; (*d*) if the company should cease or threaten to cease to carry on its business; (*e*) if a receiver should be appointed of the company's assets or any part thereof.

On January 17, 1933, Yagerphone, Ld., paid to a creditor the sum of 240*l.* 11*s.* 2*d.* On January 23, 1933, another creditor levied execution on the goods of the company. On January 28, 1933, the applicant demanded payment of the money secured by the debenture. On January 31, 1933, the applicant appointed the person named in the summons to be the receiver of the property comprised in the charge created by the debenture. On March 31, 1933, Yagerphone, Ld., passed a resolution for voluntary liquidation.

The liquidators took proceedings to recover from the creditors who had been paid on January 17, 1933, the sum of 240*l.* 11*s.* 2*d.*, alleging that the payment was a payment made by Yagerphone, Ld., with a view to preferring them over the other creditors. The proceedings were based on s. 265 of the Companies Act, 1929, which incorporates into the liquidation of the company the provisions of s. 44 of the Bankruptcy Act, 1914.

In December, 1933, the creditors paid to the liquidators the sum claimed by them, i.e., 240*l.* 11*s.* 2*d.*, and the contest between the liquidators and the applicant is whether the sum paid in these circumstances is charged by the debenture held by the applicant or whether it is a sum which the liquidators are entitled to retain and distribute among the creditors for whom they hold the assets—namely, the creditors of the company who have proved in the liquidation.

Lionel Cohen K.C. and *Maurice Berkeley* for the applicant. This money is the property of the company. Nothing vests in the liquidator. By virtue of s. 276, sub-s. 1, of the Companies Act, 1929, misfeasance moneys form part of the assets of the company.

[They referred to Palmer's Company Precedents, 14th ed., vol. ii., p. 459.]

Grant K.C. and *C. Montgomery White* for the respondents. The money, when recovered, was not recovered for the benefit of any particular creditor but was recovered for the benefit of the general creditors. The doctrine of fraudulent preference does not exist for the benefit of a single creditor but for the benefit of the creditors generally. The debenture holder has never had a claim at all.

[They referred to *Ex parte Cooper* (1) and *Willmott* v. *London Celluloid Co.* (2) They also referred to Lindley on Companies, 6th ed., p. 901; Buckley on the Companies Acts, 11th ed.,

(1) L. R. 10 Ch. 510.

(2) (1886) 31 Ch. D. 425; 34 Ch. D. 147.

p. 545; and Stiebel's Company Law and Precedents, 3rd ed., p. 471.]

At the date of the appointment of the receiver the money was not there and was not included in the money of the company when the security contained in the debenture crystallised. The money has never been included in the security of the debenture holder and the contention of the receiver fails ab initio, because the money never was his.

Lionel Cohen K.C. in reply.

BENNETT J. [after stating the facts as above set out, continued:] So far as my attention has been called to the authorities there is, I think, no case which decides the point which calls for decision on this summons. There have been two cases which establish quite clearly that, whether in bankruptcy or in the liquidation of a company, a secured creditor has no right to enforce for his benefit the remedy which is given to a trustee in bankruptcy or the liquidator of the company of avoiding a payment or setting aside a transaction made or entered into with a view to preferring a creditor of the bankrupt or a company in liquidation. The authorities are *Ex parte Cooper* (1) and *Willmott* v. *London Celluloid Co.* (2)

Neither of these cases, as I have said, decides the point which arises on the summons. I propose to decide it in favour of the liquidators on this ground—namely, that, at the time when the securities contained in the debenture issued to H. Yager (London), Ld., crystallised, the 240*l.* 11*s.* 2*d.* was not the property of Yagerphone, Ld., the company which issued the debenture.

The debenture charges with the payments which fall to be made the undertaking of Yagerphone, Ld., and all its property whatsoever and wheresoever, both present and future.

On January 17, 1933, the creditor to whom the money was paid and from whom the money was recovered was a creditor

(1) L. R. 10 Ch. 510.

(2) (1886) 31 Ch. D. 425; 34 Ch. D. 147.

of Yagerphone, Ld. When Yagerphone, Ld., paid to the creditor the 240*l.* 11*s.* 2*d.*, that sum, in my judgment, ceased to be the property of Yagerphone, Ld. The payment to that creditor could not have been attacked or impeached, unless within three months from the date of payment the liquidation of Yagerphone, Ld., had begun, and, in my judgment, at the date when the security contained in the debenture crystallised, the sum of 240*l.* 11*s.* 2*d.* was not the property of Yagerphone, Ld., nor property in respect of which it could, I think, be said that Yagerphone, Ld., had even a contingent interest.

The right to recover a sum of money from a creditor who has been preferred is conferred for the purpose of benefiting the general body of creditors, and I think Mr. Montgomery White was right when he said that the sum of money, when recovered by the liquidators by virtue of s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914, did not become part of the general assets of Yagerphone, Ld., but was a sum of money received by the liquidators impressed in their hands with a trust for those creditors amongst whom they had to distribute the assets of the company.

The application fails and must be dismissed.

Solicitors: *H. Fishman; Heywood & Ram.*

J. L. D.

HAY *v.* CARTER AND OTHERS.

[1933. H. 4028.]

C. A.
1934
FARWELL J.
Nov. 16.
C. A.
1935
Feb. 20.

Principal and Surety—Practice—Payment by one surety—Claim for contribution against co-sureties—Principal debtor not a party and insolvency not pleaded—Inference of insolvency from facts.

When a surety sues his co-sureties for contribution he must make the principal debtor a party to the action unless the principal debtor's insolvency is proved or can be reasonably inferred by the Court from the facts of the case.

Decision of Farwell J. dismissing such an action on the ground that the principal debtor was not a party or proved to be insolvent reversed on the ground that his insolvency might properly be inferred.

Lawson v. *Wright* (1786) 1 Cox, 275 considered.

Dering v. *Earl of Winchelsea* (1787) 1 Cox, 318 applied.

ACTION.

The plaintiff and the three defendants, Messrs. Carter, Barker, and Ducat, were joint guarantors to the extent of 1500*l.* for Andrew Ducat, Ld., in account with the Westminster Bank Ld. by virtue of two written guarantees dated April 2, 1929, and April 24, 1930. In February, 1933, the company was indebted to the Bank to the extent of 1195*l.* 16*s.*, and the Bank demanded payment from the guarantors. The plaintiff paid 384*l.* 12*s.* 7*d.* towards the debt. On October 16, 1933, the Bank obtained judgment against the plaintiff and the defendants for the balance, amounting to 934*l.* 12*s.* 7*d.* A bankruptcy notice was issued on January 9, 1934, against the plaintiff, and as it was not complied with a bankruptcy petition was brought against the plaintiff on February 12. The plaintiff paid the Bank in full on February 16, 1934, and now brought the present action to recover contribution from his co-sureties. Messrs. Carter and Ducat raised no defence, but the defendant Barker pleaded that he had been exonerated from any financial liability by the other co-sureties in consideration of his resigning his salaried post as managing director of the company.

J. F. Bowyer for the plaintiff.

H. F. F. Greenland for the defendant Barker. The plaintiff is not entitled to any relief against my client. He has not made the principal debtor, the company, a party to the action nor has he proved that the company is insolvent. [He referred to *Lawson* v. *Wright.* (1)]

R. L. Edwards for the other defendants.

J. F. Bowyer. I ask your Lordship to allow an amendment to the statement of claim by adding the company as a defendant. The Court has the widest powers.

FARWELL J. The plaintiff is suing on two written guarantees to secure the sum of 1500*l.* given on behalf of Andrew Ducat, Ld., in favour of the Westminster Bank and the three defendants are his co-sureties. The Bank obtained judgment against the plaintiff and the defendants for 934*l.* odd and called upon the plaintiff to pay under the guarantee, and having paid he now claims contribution from his co-sureties. The defendant, Mr. Barker, has pleaded a defence involving a question of fact—namely, that he had been released from any financial liability under the guarantee by his co-sureties. The other two defendants have not put in any defence, and if, as I understand, they by their counsel consent to judgment, the plaintiff is entitled to judgment against them. At the close of the plaintiff's case and before opening his defence, Mr. Greenland on behalf of Mr. Barker submitted that the plaintiff had not proved his case and was entitled to no relief against his client on the ground that the plaintiff had neither proved that the company was insolvent nor made the company a party to the action ; and in support of this submission he referred me to the case of *Lawson* v. *Wright* (1), a case where a surety sued the principal debtor and co-surety alleging the insolvency of the former and claiming contribution on that ground. The insolvency of the principal debtor not having been proved, the Master of the Rolls stated that he would have refused relief if the principal debtor had not been made a party to the action. That case

(1) 1 Cox, 275.

appears to be an authority for the proposition that where a surety sues his co-sureties for contribution, he must either prove the insolvency of the principal debtor or make him a party to the action and is directly in point here. So far as I am aware that decision has never been reversed, and I think I am bound to follow it. Then it is said on behalf of the plaintiff that the Court ought to grant leave to amend the statement of claim by adding the company as a defendant. I do not think that in this case it would be right to allow an amendment. The plaintiff could have avoided the difficulty by making the company a defendant, but as he has not done so it was essential for him to prove the insolvency of the company. This he has not done and he has therefore failed to prove his case. The action must be dismissed as against Mr. Barker, but since an unqualified dismissal of this action might result in an injustice to the plaintiff the order I make is that the action and the counterclaim be dismissed with costs but without prejudice to either party commencing fresh proceedings.

R. A. Y.

C. A.

The plaintiff appealed. The appeal was heard on February 20, 1935.

J. F. Bowyer for the appellant. It was not necessary to make the company a party or to prove its insolvency. *Lawson* v. *Wright* (1), on which Farwell J. relied, only laid it down by way of a dictum that if the principal debtor is not a party, his insolvency must be proved. In *Dering* v. *Earl of Winchelsea* (2) it was said to be sufficient if the insolvency of the principal debtor could be inferred from all the circumstances without strict proof; and this was done in that case in circumstances closely resembling those in the present case.

[LORD HANWORTH M.R. referred to *Stirling* v. *Burdett* (3) and *Ex parte Snowdon.* (4)]

The matter is discussed in Rowlatt on Principal and Surety, 2nd ed., p. 229. It is contended that in an action by a surety against his co-surety for contribution it is for the co-surety to set up the defence that the principal debtor is solvent.

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(1) 1 Cox, 275.
(2) 1 Cox, 318.
(3) [1911] 2 Ch. 418.
(4) (1881) 17 Ch. D. 44.

[LORD HANWORTH M.R. referred to *Hitchman* v. *Stewart.* (1)]

In any case there is sufficient in the facts to enable the inference of the insolvency of the company to be drawn by the Court, as in *Dering* v. *Earl of Winchelsea.* (2)

[He was stopped.]

H. F. F. Greenland for the defendant Barker. It is a rule in equity that in any action by a surety against a co-surety the principal debtor must be joined as a party, but this is excused when it is proved that the principal debtor is insolvent: *Lawson* v. *Wright* (3); *Hitchman* v. *Stewart* (1); and *Madox* v. *Jackson.* (4) And it is so laid down in successive editions of Daniell's Chancery Practice on the authority of these cases. The insolvency of the company is not a matter which can be implied, for no winding-up order has been made against it. The principal debtor is primarily liable to recoup the surety what he has paid, and that is why it is necessary to have the principal debtor before the Court on a claim against co-sureties or to have it alleged and proved that the principal debtor is insolvent. This is not therefore a mere question of convenience but a condition precedent to any claim against the co-sureties being maintained.

R. L. Edwards for the other two defendants.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. It appears to raise a point of law of importance although in the result the question is whether true effect has been given to a principle of law which stands good and must be applied. The facts on which the action was brought may be stated shortly. The plaintiff and the three defendants were directors of a company known as Andrew Ducat, Ld., and they gave two guarantees to the Westminster Bank guaranteeing the company's account with the Bank. Those guarantees were given in 1929 and 1930. In 1933 a demand was made by the Bank upon the guarantors for the payment of a sum of 1195*l.* 16*s.*, no doubt the amount of the over-due account of the company, and in September of that year Mr. Hay, the plaintiff, paid up a sum of 384*l.* in respect of the principal debt and interest. But that was not sufficient for the Bank, and it issued a writ on September 14 against all the guarantors and recovered judgment under Order XIV. on October 16 for the amount then due, which was 913*l.* 12*s.* 7*d.*, together with a sum of 12*l.* 9*s.* 6*d.* costs. That meant that there was a liability, upon those figures, of about 926*l.* A bankruptcy notice was issued on January 9 against the plaintiff Hay and served upon him on the 13th. It was not complied with, which meant, of course, that he had committed an act of bankruptcy. Thereupon, on February 12, a petition in bankruptcy was lodged against the plaintiff, and the plaintiff, placed in that very serious difficulty, paid up the full amount of the debt and costs then owing to the Bank, which by that time had amounted to a little more than the figures I have already given—namely, 934*l.* 12*s.* 7*d.*

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(1) (1855) 3 Drew. 271.
(2) 1 Cox, 318.
(3) 1 Cox, 275.
(4) (1746) 3 Atk. 406.

On November 17, 1933, Mr. Hay commenced an action in the Chancery Division claiming, first of all, a declaration that the defendants were jointly and severally liable to him for contribution and all necessary accounts and inquiries; and he claimed that he was in the position of a co-surety who was entitled to be indemnified by his co-sureties. No defence was put in by Mr. Carter or Mr. Ducat, but a defence was put in by Mr. Barker, who claimed in effect that he had only given the guarantee to the Bank because the Bank had required the signature of all the directors, and that the directors had agreed to indemnify him from any liability which arose against him under this guarantee given to the Bank. And he counterclaimed in respect of the rights which arose by reason of that agreement made by the other directors and asked for a declaration that the other defendants and the plaintiff were bound to indemnify him against any liability and to exonerate him from any claims to contribution. The action came before Farwell J. Proof was given of the payment of this sum of 934*l.* 12*s.* 7*d.*, and the facts I have stated were told to the learned judge, and then the plaintiff's case was closed. On behalf of Mr. Barker, Mr. Greenland took the point that the principal debtor ought to be a defendant to the action, and that, in the absence of the company, the action could not be dealt with by the learned judge; and for that he gave the authority of *Lawson* v. *Wright.* (1) Farwell J. acceded to that view, and said this: "At the close of the plaintiff's case, and before opening his defence, Mr. Greenland, on behalf of Mr. Barker, submitted that the plaintiff had not proved his case and was entitled to no relief against his client on the ground that the plaintiff had neither proved that the company was insolvent nor made the company a party to the action; and in support of this submission he referred me to the case of *Lawson* v. *Wright* (1), a case where a surety sued the principal debtor and co-surety, alleging insolvency of the former and claiming contribution on that ground. The insolvency of the principal debtor not having been proved, the Master of the Rolls stated that he would have refused relief if the principal debtor had not been made a party to the action. That case appears to be an authority for the proposition that where a surety sues his co-sureties for contribution, he must either prove the insolvency of the principal debtor or make him a party to the action and is directly in point here." Farwell J. held, therefore, that the failure to make the principal debtor a party could not be excused, unless there were affirmative proof that the principal debtor was in fact insolvent, and that as that proof had not been given the plaintiff's claim had not been established. He thereupon dismissed the action and ordered the plaintiff to pay the costs of all three defendants, and he also dismissed the counterclaim and as regards Mr. Barker granted a set-off in respect of the costs of claim and counterclaim.

We have looked into the case of *Lawson* v. *Wright* (1) to see whether or not the course adopted by the learned judge was the necessary and right course as established by that case. It certainly seems somewhat startling to find that in these days an action can be dismissed out of Court by reason

(1) 1 Cox, 275.

of the failure to have the proper parties before the Court. No amendment was allowed; no adjournment was allowed for the purpose of further joinder of the principal debtor, but the learned judge said that his order in the action was to be without prejudice to either party commencing fresh proceedings; in other words, there was liberty to start over again and bring the matter before the Court when the proper parties should be presented to the Court. We have, as I said, looked at *Lawson* v. *Wright* (1) and we have also looked at some other cases. It would appear that the rule which Farwell J. applied related to an objection in point of form to the action. It does not appear to be established in any of the cases that the objection taken was based on non-fulfilment of a condition precedent to the plaintiff's right to bring his action; and it would seem also that the insolvency of the principal debtor would excuse the failure to join him as a defendant and that insolvency of the principal debtor need not necessarily be established by affirmative evidence. In *Lawson* v. *Wright* (1) the judgment given by Sir Lloyd Kenyon M.R. contains these words: "His Honour was very clear on the general equity of the case, and said it had been established ever since the origin of Courts of Equity, that one surety had a right to call on another for contribution in cases of this nature; but his Honour had some doubts whether it was not absolutely necessary to prove the insolvency of the principal, which was not done in the present case. To which objection it was answered by the counsel for the plaintiff, that although such was the rule where the principal was not before the Court, yet the principal being here a defendant, it was competent to the Court to make such a decree, as it could at the same time direct payment from the principal to the co-surety, and it was also suggested that there might be a difference in the case where the money had been actually paid by one surety." As a matter of fact, the decree was for an account, and the head-note says: "On a bill filed by a surety against his co-surety and the principal for a contribution from the

(1) 1 Cox, 275.

Lord Hanworth M.R.

co-surety in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise where the principal is not a party to the suit." I turn now to look at some of the other cases in which this point has been considered. In *Hitchman* v. *Stewart* (1) it was contended that in similar circumstances the principal debtor was not a necessary party; and three cases were cited to establish that point. The first is *Madox* v. *Jackson* (2), where Lord Hardwicke says: "The general rule of the court, to be sure, is, where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are intitled to the assistance of each other in taking the account. Another reason is, that the debtors are intitled to a contribution, where one pays more than his share of the debt." Then he says: "But there are exceptions to this, and the exception out of the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the court, unless he had paid the debt. The exception out of the second rule is, that if there are no personal assets at all, and this fact appears plainly in the cause, there is no occasion to bring the representative of that co-obligor before the court." It is therefore stated by Lord Hardwicke not that there is a condition precedent, but that the Court must be informed whether or not it was of importance that the further party should be before the Court, and the necessity of the party being before the Court was answered if there were no personal assets in his hands at all. I turn to the next case in which that point was considered; it is *Collins* v. *Griffith.* (3) There King L.C. refers to the question of the necessity of having all the obligors before the Court and overruled the objection that it was necessary to make them all parties to the suit. In the last case to which I need refer, the case of *Angerstein* v. *Clarke* (4), it is said by the Lord Chancellor that "if one of the persons living (which is a stronger case than that of a dead person) be admitted

(1) 3 Drew. 271.

(2) 3 Atk. 406.

(3) (1725) 2 P. Wms. 313.

(4) (1790) 3 Swanst. 147*n*.

to be insolvent, surely it ought to be an answer to an objection for want of parties." After looking at those cases, I now turn to the case of *Dering* v. *Lord Winchelsea* (1), where the objection was taken that the principal debtor was not before the Court, and the observation which is made by Eyre C.B. is (2): "The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but in substance the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds." It appears, therefore, that this rule is not to be treated as relating to a condition precedent, but is a rule to be observed unless there is the excuse of insolvency to show that it would serve no useful purpose to insist on the presence of the principal debtor before the Court. In a passage which is to be found in Rowlatt J.'s book on Principal and Surety, 2nd ed., pp. 229, 230, he says: "It would seem right upon principle that a surety should not have contribution from a co-surety unless he proves that the principal is insolvent, or at any rate that there is some impediment to suing him. The contrary course would certainly lead to a multiplicity of suits, and where he has no contract giving him such a right it seems anomalous that the surety paying should have an equity to contribution so long as the remedy against the principal, which would relieve all the sureties, is available."

Now the upshot of all this appears to be that the rule in *Lawson* v. *Wright* (3) must be affirmed and applied but that its observance can be avoided if there is evidence that no useful purpose would be served by having the principal debtor before the Court by reason of his insolvency. In other words, the rule does not lay down a condition precedent, but deals with a matter of form, and a departure from it may be made

(1) 1 Cox, 318.

(2) Ibid. 323.

(3) 1 Cox, 275.

if it is proved or if it becomes plain to the Court that there is sufficient revealed, in the facts before the Court, to justify the inference that the principal debtor is insolvent. That is an implication which the Court itself will draw, as in *Dering* v. *Lord Winchelsea.* (1) I would also say, although it is unnecessary to go further into the matter, that *Lawson* v. *Wright* (2) and its limitations have been considered in the two cases of *Ex parte Snowdon* (3), where the case is examined by Cotton L.J., and *Stirling* v. *Burdett* (4), where an important judgment is given by Warrington J.

I turn now, therefore, after considering those authorities and the limitation on the rule, to consider what has happened in the present case. It appears from the pleadings, upon the facts brought to the knowledge of the Court, that this sum of 934*l.* was paid up in respect of the overdraft on the account of the company, the claim for it being enforced against the guarantors and not made against the company itself ; so that the only proper inference is that the company itself was insolvent and unable to pay. The implication which was drawn in *Dering* v. *Lord Winchelsea* (1) can therefore be drawn in the present case also, and the result is that it was unnecessary to insist upon the company being made a defendant, and that the plaintiff's action ought not to fail by reason of a defect of form.

In those circumstances, the right course will be to allow the appeal and to send the case back to be further tried before the judge of first instance ; but the respondent Barker must pay the plaintiff's costs of this appeal, and the costs also of the two defendants, Carter and Ducat, who are also respondents to this appeal ; and he must also pay the costs of all parties which have been thrown away by his taking the point as to the form of the action which caused its dismissal.

ROMER L.J. I have arrived at the same conclusion, but as we are differing from Farwell J., I should like, out of respect to him, to state my own reasons for so doing.

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(1) 1 Cox, 318.
(2) 1 Cox, 275.
(3) 17 Ch. D. 44.
(4) [1911] 2 Ch. 418.

Where a surety has paid the principal creditor the whole of the debt due to him and is suing his co-sureties for contribution without making the principal debtor a party, it is not, in my opinion, a condition precedent to the plaintiff's right to sue that the principal debtor should be insolvent. Therefore, in such an action it is not strictly necessary as a matter of pleading for the plaintiff to allege such insolvency; but in order to avoid multiplicity of actions and to enable the Court to adjust all the rights between the sureties and the principal debtor once and for all, the Court has laid down a rule of convenience, a very salutary rule and one that I hope will always be observed, but none the less merely a rule of convenience. It is that for the purposes I have mentioned the principal debtor should be brought before the Court unless the plaintiff can give to the Court some good reason for not doing so. One very obvious reason for not doing so would be the insolvency of the principal debtor, because it would be quite useless to bring him before the Court to enable the Court to adjust all the rights. There may be, and there no doubt are, other reasons which may be sufficient for not bringing the principal debtor before the Court, and in considering whether the plaintiff has shown sufficient reason for not bringing the principal debtor before the Court the Court can act on such material as it thinks proper. In the present case, therefore, when Mr. Bowyer closed his case without having alleged the insolvency of the principal debtor, it was not in my opinion right for the learned judge, without more, to dismiss the plaintiff's action as though he had shown no cause of action at all against the defendants. It was, however, right for the defendants to call the Court's attention to the fact that the principal debtor was not there, and if the defendants had not called the attention of the learned judge to that fact, the learned judge himself might have asked, and ought to have asked, the plaintiff why the principal debtor was not a party. If the plaintiff then asked, as he did in the present case, for leave to amend upon proper terms by adding the principal debtor as a defendant or for an opportunity of explaining to the Court why the principal debtor was not a party, I think that the learned judge should have acceded to the plaintiff's counsel's request. The truth of the matter is, as it seems to me, that the objection to the absence of the principal debtor was not an objection going to the root of the plaintiff's cause of action but was merely an objection as to the absence of parties, and, that being so, Order XVI., r. 11, is directly applicable. That rule states: "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." The rule goes on: "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." But instead of adjourning the case in order that the plaintiff might either join the principal debtor as a party or have an opportunity of giving reasons for not having joined the principal debtor, the Court may in a proper case come to the conclusion on the materials then before it that no good purpose would be served by adding the principal debtor. The present case, as it appears to me, is exactly a case of that description. I will not go through the facts again; they have already been stated by the Master of the Rolls, but those facts afford eloquent testimony to the uselessness of adding the company, the principal debtor in this case; and therefore I think the learned judge should, notwithstanding the objection that the principal debtor was not before the Court, have proceeded with the trial of the action.

For these reasons, as well as for those which have been given by the Master of the Rolls, I think that this appeal must be allowed with the consequences that he has indicated.

MAUGHAM L.J. I am of the same opinion, and agreeing as I do precisely with the statement of the law given by Romer L.J. I do not think it necessary for me to repeat what he has said on that point. In my opinion the question whether the principal debtor in such a case as this should be a party to the action is a question of convenience; and I will repeat what the Lord Justice has said in this form, that I think the question is whether the presence of the principal debtor before the Court is necessary "in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." I take those words from Order XVI., r. 11, which distinguishes between the case where a person who is not present is a necessary party and the case where he is a person such as the words I have quoted describe.

I would add that if the view were right that as a matter of law it was necessary before this action could be maintained either to add the principal debtor, Andrew Ducat, Ld., as a defendant or to prove strictly that that company was insolvent, that is a point which any one of the defendants, including of course the defendant Barker, could have raised in his defence according to the terms of Order XXV., r. 2. The defendants having failed so to raise it, although it stared them in the face, I am of opinion that that would have been a strong ground for allowing an amendment under Order XVI., r. 11, even if the point involved had been a matter of strict law. By that I do not mean that a question of law of that kind need as a matter of necessity be pleaded by the defendants; but I do think that when an obvious question of law arises in an action and the defendants do not plead it, the judge may well bear in mind the intention of the Rules of the Supreme Court, that merely technical objection should not be allowed to defeat an action, or, in other words, that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties." The Court in such a case may properly exercise its discretion in favour of allowing the amendment. There was, as I have already inferentially stated, no question of surprise here because the defendants knew perfectly well that the guarantee given was a guarantee of the company's indebtedness and that there was no allegation in the pleadings that the company was insolvent. However, as I have already said, I take the view that the point was really only one of convenience, and I think the question here is whether on the materials before the Court it was possible to hold that the presence of the company was necessary in order to enable the Court completely to settle the various questions involved.

On that I should like to say a word out of respect to Mr. Greenland's strenuous argument to the contrary. I should observe that we do not start with an ordinary case where we know nothing about the principal debtor ; we begin in this case with a case of a kind which is exceedingly common and frequently met with by those who are conversant with business in the City of London, where a company, desirous of either issuing debentures or obtaining advances from its bank, finds itself bound to obtain the guarantees of its directors. The facts here are stated in paras. 2 and 3 of the defence of Mr. Barker, and it appears that the guarantee of all the directors was necessary for the overdraft to be allowed by the Bank to the company. The defence set up by Mr. Barker was that it was for that very reason that he joined in the guarantees, it being verbally represented to him that the company's bankers required the guarantees of all the directors, of whom he was one. Further, para. 4 of the defence makes it apparent that the principal debtor had fallen upon bad times, and the defendant Barker, who had been the sales manager of the company's business at a salary of about 312*l.* a year, was so alarmed at the financial responsibility that he was under in connection with the company's affairs that he verbally agreed to resign his salaried post with the company on condition that the plaintiff and the defendant Ducat agreed to exonerate him from any responsibility in connection with the company's affairs. That was done, according to the defence, in April, 1930. That the company did not improve its position is made clear by the fact that on February 25, 1933, the Bank served notice in writing on the plaintiff and the defendants demanding payment under the guarantees of the sum of 1195*l.* 16*s.*; and it was after the plaintiff had paid to the Bank a smaller sum than that in part satisfaction of his liability that an action was commenced in the King's Bench Division by the Bank against the plaintiff and the defendants, the company not being included as a defendant, in which the Bank recovered judgment on October 16, 1933, for the sum of 913*l.* 12*s.* 7*d.* and a sum for costs. The plaintiff had bankruptcy proceedings taken against him, and there was never apparently a more unwilling payment by a guarantor, for it was only when the bankruptcy proceedings were on the point of resulting in a receiving order that he paid the whole amount to the Bank. In the King's Bench proceedings none of the defendants thought fit to take proceedings by way of third party process against the company, and it is apparent that the plaintiff himself did not think it worth while to try to recover anything from the company, not only because he commenced no proceedings against it and did not attempt to wind it up, but also because he paid the whole sum himself.

The question is not, as it seems to me, whether it has been proved by strict evidence and beyond all doubt that the company was and is insolvent. The question is whether there was not, in the circumstances I have stated, prima facie evidence that the presence of that principal debtor in any proceedings that might take place in Chambers in Chancery with a view to enabling the Court "effectually and completely to adjudicate upon and settle all the questions involved" was not necessary. I have not the smallest hesitation in coming to the conclusion that on those facts there is strong prima facie ground for thinking that the presence of the company would have been perfectly useless and would only have led to an increase in the costs. It was open to the defendant Barker, had he chosen, to raise the point by saying: "I am going to call evidence to show that the company has some money and ought to be a party to this action, and therefore that the proceedings must be stayed at the expense of the plaintiff until the company is added as a party." He did nothing of the sort; on the contrary, what he did was to raise a defence, a plain and intelligible defence absolutely disconnected from the question whether the company was before the Court or not, a defence which could have been made and persisted in and proved in the absence of the company without the smallest difficulty, had it been sound in point of fact. This is therefore one of the rare cases, in my opinion, where a statement made in an ancient case is almost exactly in point. The decision in *Dering* v. *Lord Winchelsea* (1) was given by Eyre C.B. on February 8, 1787, and it really is curious how apposite the passage which has already been read (2) is to the present case. He says: "In substance the insolvency of Mr. Dering"—that is the principal debtor—"may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment"—that is what has happened here, he submitted to the judgment without bringing in the principal debtor—"and the defendants"—in this case it is the defendant Barker—"have made their defence on other grounds,"—that is precisely what Mr. Barker did here. Without saying "I want the company added," Mr. Barker says: "I shall raise a totally different point dependent upon a contract made by the plaintiff with me to hold me free from any liability on this guarantee." Accordingly it seems to me, with the greatest respect to the learned judge, that in this case the proper course was to proceed with the discussion of the defence which had been raised by Mr. Barker, and the case must therefore go back to have the question raised by his defence adjudicated upon.

On those grounds I agree with the judgments of my learned brethren.

Appeal allowed.

Solicitors: *Ernest C. Randall; Gregsons, for Barwell & Philcox, Lewes; Thomas Griffiths.*

(1) 1 Cox, 318.

(2) Ibid. 323.

H. C. G.

In re BOLSOM BROTHERS (1928), LIMITED.

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EVE J.
Nov. 12;
Dec. 3, 10, 18.
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Feb. 12, 21.

[No. 00624 of 1934.]

Company—Memorandum of Association—Objects—Petition to confirm alteration—Proposed extension to number of disconnected retail trades—Petition opposed—Limited sanction—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 5.

A company incorporated for the primary object of acquiring and carrying on two businesses, one that of a private company making and selling footwear and clothing, but with other wide powers, and the other that of a retailer of footwear, petitioned the Court for sanction to an extension of its objects, as set out in its memorandum of association, to the carrying on of a large number of different retail trades, including that of universal stores. The extension was approved by the company in general meeting without opposition, but the petition was opposed by certain preference shareholders:—

Held, by Eve J., that there being no evidence that the proposed alterations were necessary or proper to enable the company's business to be carried on more efficiently, and as the trades it was proposed to take power to work were entirely outside the original objects of the company, the Court would refuse to sanction the petition.

On appeal additional evidence was adduced to show that a large number of the trades to which it was sought to extend the company's objects were already being carried on by the company, and that to this extent the object of the petition was to regularize the position, and further that during the year 1934 a small profit had been made by the company as opposed to the loss suffered in 1933.

Held, by the Court of Appeal, that in view of the further evidence the alterations in the objects, when limited so as to give power to carry on only those trades which were already being carried on by the company, should be sanctioned.

PETITION.

The petition was presented by the above company, Bolsom Brothers (1928), Ld., for the sanction of the Court to an alteration and extension of the objects clause of the memorandum of Association by adding thereto a large number of retail trades, including that of " universal stores."

The facts appear fully from the arguments and the judgment of Eve J.

J. B. Lindon for the petitioners. The company was incorporated in 1928 to take over two businesses, that of a company under the same name without the date "1928," which carried on a shop and mail order business for the sale by retail of boots, shoes, clothing and bedding, and other articles required by customers, and that of Morris Bolsom, who had a retail business in boots and shoes. It is now desired to extend the objects to a number of other trades which can conveniently be carried on. The original company whose business was acquired had very wide powers in its memorandum. The proposed alterations were approved by special resolution which was passed unanimously and no poll was demanded. One of the opponents to the petition gave a proxy in favour of the resolution, but afterwards attempted to withdraw it. The proposed extensions come under sub-paras. (*a*) and (*d*) of s. 5 of the Companies Act, 1929. The company is carrying on certain classes of business, such as furniture and upholstery, as to which there may be a doubt whether they are within the present powers. If not, the company desires to include them without any possibility of doubt.

[Eve J. suggested that the petition should be adjourned to enable the petitioners to present further evidence as to what businesses were being carried on and the respective volume of those businesses, and an adjournment was granted.]

Wynn Parry for two preference shareholders who had given notice of opposition. The petition is opposed on three different grounds: (1.) At present the company has, strictly speaking, only power to carry on a boot and shoe business, and certain other businesses which are not ancillary and which it does not carry on. (2.) Although the company is also carrying on a furniture and clothing business, there is no satisfactory evidence that this branch is being carried on at a profit. (3.) The business of the company has always been run at a loss, and the Court should not extend the objects so as to embrace almost any trade including that of a "universal stores." The company having lost money on its own legitimate business, that of the sale of boots and shoes, now desires to be able to embark on any kind of retail business which the managing director, Mr. Morris Bolsom, may propose to take up in future. The proposals are too wide, indefinite and speculative, and the Court in its discretion should refuse to sanction them. The wide objects of the original company, Bolsom Brothers, Ld., are not material on the present petition.

A proper profit and loss account distinguishing the furniture, clothing, and other separate branches of businesses from the boot and shoe business should be produced, showing approximately whether each branch is paying or not. There is no satisfactory evidence that many of the businesses which it is proposed to carry on could " conveniently or advantageously be combined with the business of the company."

[EVE J. referred to *In re John Brown & Co., Ld.* (1)]

I am prepared to agree to an extension to cover dealing in furniture and upholstery, upon evidence that those branches are being carried on at a profit.

Lindon in reply. The company took over a mail order business which, though primarily for the sale of boots and shoes, clothing and bedding, is difficult to restrict to any particular trade. Customers often ask for articles not in the catalogue, to go with goods they have ordered. If the company has been carrying on business ultra vires its powers, that is a good reason why the proposed extension should be allowed.

Cur. adv. vult.

1934. Dec. 18. EVE J. The petitioning company prays that an alteration of the company's objects proposed to be effected by a special resolution passed on August 31, 1934, may be confirmed by the Court pursuant to s. 5 of the Companies Act, 1929. The petitioners allege that the proposed alteration is required to enable the company to carry on its business more efficiently, and to carry on certain businesses and classes of business which, under existing circumstances, may conveniently and advantageously be combined with the business of the company.

(1) (1914) 112 L. T. 232.

The Court may make an order confirming the alteration either wholly or in part, and upon such terms and conditions as it thinks fit, and shall, in exercising its discretion under the section, have regard to the rights and interests of the members of the company, or of any class of them, as well as to the rights and interests of the creditors.

The company was incorporated on January 5, 1928, with a capital of 102,000*l.*, divided into 85,000 shares of 1*l.* each and 340,000 shares of 1*s.* each. By its memorandum the company had power to divide the shares in the capital, whether original or increased, into several classes, and to attach thereto respectively any preferential, deferred, qualified or special rights, privileges or conditions. No information is given in the petition whether this power has been exercised, but it appears from Article 6 and an exhibit, " M.B.6 "—a copy of the company's accounts as on December 31, 1933—that the 85,000 1*l.* shares have been issued as 7½ per cent. cumulative preference shares and the 340,000 1*s.* shares as ordinary shares.

The primary object with which the company was incorporated was to enter into and carry into effect an agreement between Bolsom Bros., Ld., of the first part, Morris Bolsom of the second part, and the company of the third part, whereby the company was to acquire and take over as a going concern the undertaking of Bolsom Bros., Ld., and the business of Morris Bolsom carried on at 90 Chrisp Street, Poplar, and all or any of the assets and liabilities of these businesses, and to carry on the business so to be acquired and to develop the same, and to carry on (inter alia) the business of manufacturers of and dealers in all kinds of boots, shoes, footwear and shoe machinery.

Bolsom Bros., Ld., was a private company incorporated in 1922 with a capital of 5000*l.* with very wide objects, of which the primary one was to carry on business as manufacturers and dealers in boots and shoes. The business of Morris Bolsom was that of a retail dealer in boots and shoes. No evidence has been produced as to the contents of the agreement between the vendors and the petitioning company, but there

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is a significant and, I do not hesitate to say, an unsavoury element in a paragraph in Article 2, which provides that the basis on which the company is established is that the company shall enter into the contract and its validity is not to be impeached or in any wise affected, nor shall any claim be made on the ground that any of the directors as promoters, directors, or otherwise, stand in a fiduciary position towards the company, or that the board is not independent, or that the purchase price payable has been fixed without any valuation, or upon any other ground whatever, and every member of the company present or future shall be deemed to join the company on this basis.

The significance of this clause is perhaps better appreciated when it is disclosed that the price charged for goodwill was 28,000*l.*, that the promoter is the chairman and managing director and the holder of the only debenture issued by the company, one for 20,000*l.* carrying interest at 2 per cent. above Bank rate, with a minimum of 7 per cent. per annum.

Turning now to the company's memorandum and realizing that its primary object is the acquisition and carrying on of the business of manufacturers and dealers in boots and shoes, and that the first three paragraphs of its memorandum may be construed as containing objects ancillary to the primary object, do not the remaining thirty clauses, as Neville J. said in *In re John Brown & Co., Ld.* (1), extend to every legitimate business which the company could desire to carry on for the advantage of their principal business? Let me indicate a few of these subsidiary objects, remembering, first, that this was a company formed to take over a boot manufacturing business and a retail shop in Poplar for the sale of boots and shoes. I am taking them rather at random, but paras. 6, 7, 8 and 9 of the memorandum give the company power "to construct or acquire ships, barges, lighters and boats, wharves and warehouses of any description, and to carry on all or any of the businesses of shipowners, bargeowners, wharfingers, warehousemen and merchants." (7.) "To construct railways, tramways, canals, docks, harbours, piers,

(1) 112 L. T. 232, 234.

wharves, roads, embankments, reservoirs, works of irrigating and reclaiming land, electric, telephonic, water, gas or power supply works, and to equip, work and maintain railroads and tramways, and to carry on the businesses of a gas or water company or electrical engineers," and (8.) to purchase land, machinery and plant, and (9.) " To acquire and undertake on any terms and subject to any condition the whole or any part of the business, property and liabilities of any person or company carrying on any business which this company is authorised to carry on or possessed of property suitable for the purposes of the company." I do not pause to read them in extenso, but paras. 10, 14, 16, 17 and 18 cannot be overlooked and 20 is of an unusual character. It empowers the company to purchase with a view to closing or re-selling in whole or in part any business or properties which may seem or be deemed likely to injure by competition or otherwise any business or branch of business which the company is authorized to carry on. Under the succeeding paragraphs the company is authorized " to pay all preliminary expenses of the company and any company promoted or formed by the company, or any company in which this company is or may contemplate being interested, including in such preliminary expenses all or any part of the costs and expenses of owners of any business or property acquired by the company," and " to apply for at the cost of the company and obtain any provisional order or Act of Parliament, or order or decree of any court, or concession or right from any authority, supreme, municipal, local or otherwise, for enabling the company to extend its objects, or to carry any of its objects into effect, or for effecting any modification of the company's constitution, or for any other purpose which may seem calculated directly or indirectly to benefit the company, and to oppose any provisional order, Bill in Parliament, decree, right or concession which may seem directly or indirectly opposed to the company's interests," and to form subsidiary companies and do anything which it seems good to them to empower a subsidiary company to do. By para. 33 a limitation is introduced. It provides that nothing contained in the memorandum is to empower the company to carry on the business of assurance or to grant annuities within the meaning of the Assurance Companies Act, 1909, as extended by the Industrial Assurance Act, 1923, or to reinsure any risks under any class of assurance business to which those Acts apply.

Under this constitution the company has carried on business for some six years or more. During that period two subsidiary companies have been established, one of them, be it noted, to develop the "club" trade which, counsel for the company suggested, was one of the chief matters for which wider powers were required. I do not appreciate that point in view of the fact that this activity has been entrusted to a subsidiary company. If the subsidiary company requires to extend its objects, it is for it to take steps for that purpose and not for the parent company.

The balance sheet at the end of 1933—by which time the gross figures in exhibit "A" could have been replaced by net figures and the exhibit have been of some use instead of its being, as it is, quite irrelevant—shows a loss of 13,395*l.* and included as assets are items for underwriting commission and preliminary expenses of 2400*l.* and 4000*l.* respectively (that is to say, 6400*l.*), goodwill at cost, 28,000*l.*, loans to subsidiary companies 3625*l.*, and investments therein, 166*l.*

It is in these unsatisfactory circumstances that the company now comes forward asking for the addition to its objects of fifty-nine businesses, some of which the company claims are already covered by the existing memorandum. If so, nothing I can say or do will prevent the company from continuing as they have done in the past, but, on the other hand, nothing I say must be quoted as adopting the company's contention, which is not accepted by the shareholders who have come here to oppose the making of the order asked for by the petition.

Let me read a few samples from the list of further businesses which the company desires to add to its objects : "furniture dealers, cabinet makers, upholsterers, silk mercers, silk weavers, cotton spinners, cloth manufacturers, furriers, haberdashers, hosiers, manufacturers, importers and wholesale and retail dealers of and in household furniture, bedding, ironmongery, turnery and other household fittings and utensils, ornaments, stationery and fancy goods, textile fabrics of all kinds; milliners, dressmakers, tailors, hatters, clothiers, outfitters, glovers, lace manufacturers; feather dressers; manufacturers of and dealers in hardware, jewellery, plated goods, perfumery, soap and articles required for ornament, recreation or amusement, manufacturers of and dealers in bicycles and tricycles"—that is struck out, because it is alleged to be already covered—"motor carriages; dealers in provisions, drugs, chemicals and other articles and commodities of personal and household use and consumption, and generally of and in all manufactured goods, materials, provisions and produce; coach and carriage builders, saddlers, house decorators, furniture removers, owners of depositories, warehousemen, carriers, storekeepers, warehouse keepers, laundrymen, sanitary engineers and contractors in all their branches, gasfitters, land estate and house agents, builders, contractors, auctioneers, refreshment contractors, licensed victuallers, wine and spirit merchants, tobacconists, confectioners and dealers in mineral aerated and other liquors, publishers, printers, advertising agents, agents for railway and shipping companies and carriers, theatrical and other box office proprietors, farmers, dairymen, market gardeners, nurserymen and florists," and No. 59 is: "Generally the business of a universal stores."

In my opinion, I should be disregarding the statutory protection which creditors and shareholders are entitled to have extended to them by the Court, in exercising the discretion vested in me were I to confirm these alterations. It is impossible to regard the financial position disclosed in the last balance sheet of the company as satisfactory, and I endorse the view put forward on behalf of the opposing shareholders that there is no evidence going to establish that matters will be any better with these extended objects. On the contrary, there is a risk that the company will get more and more involved in businesses altogether distinct from that for which it was incorporated. In the case to which I have already referred (*In re John Brown & Co. Ld.* (1)) Neville J.

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(1) 112 L. T. 232.

was dealing with a company in a strong financial position with a very prosperous business. Further on (1) the learned judge says: "The point is that the directors could abandon the main business and take up an entirely new business without consulting the shareholders." In this case I see that each shareholder had one vote; but no information has been given in whose hands the shares are; it may be that the whole of the voting is in the hands of the vendor who holds the one debenture and is the chairman and managing director of the business. Neville J. goes on to say: "I should stand in the way of the company taking up distinct businesses. Where distinct businesses are proposed by the alterations suggested I would not sanction them except upon evidence that there was a really present desire on the part of the company to extend its business in the directions indicated."

I entirely agree with him. As I say, no information has been given to the Court as to how the shares of the company are distributed. The proposals in this case are entirely unprecedented; they have been put before the Court without the materials necessary in the case of a company whose destiny is largely in the control of the vendor; they are speculative, and quite outside the ostensible object for which the company was brought into existence, and in the exercise of the discretion vested in me I make no order on the petition except that the company do pay the costs of the opposing shareholders.

H. L. L.

C. A.

The company appealed. The appeal was first heard on February 12, 1935, and adjourned for further evidence. The appeal was then heard on February 21, 1935.

The further evidence adduced showed that large numbers of the trades sought to be added to the objects clause of the company's memorandum of association were already being carried on by the company. These were substantially all the following businesses: (1.) furniture dealers; (2.) cabinet makers; (3.) upholsterers; (4.) silk mercers; (5.) haberdashers; (6.) hosiers; (7.) importers and wholesale and retail dealers

(1) 112 L. T. 234.

of and in (*a*) household furniture, (*b*) bedding, (*c*) ironmongery, (*d*) turnery, (*e*) household fittings, (*f*) household utensils, (*g*) ornaments, (*h*) stationery, (*i*) fancy goods, (*j*) textile fabrics of all kinds, (8.) milliners, (9.) hatters, (10.) clothiers, (11.) outfitters, (12.) glovers, (13.) dealers in (*a*) hardware, (*b*) jewellery, (*c*) plated goods, (*d*) perfumery, (*e*) soap, (*f*) articles required for ornament, recreation or amusement; (14.) dealers in musical instruments; (15.) tobacconists and (18.) confectioners. In a table submitted to the Court these businesses were marked with blue pencil.

To this extent the petition had been brought with a view to regularizing the position, as doubts had arisen whether the carrying on of some of these businesses was not ultra vires.

There was also evidence that as a result of a provisional balance sheet and profit and loss account for the year it appeared that there was a net profit of 3384*l.* 18*s.* 10*d.*, and that after allowing 1510*l.* 2*s.* 11*d.* for depreciation of shop fronts, furniture, fixtures, etc., in accordance with the company's usual practice, the final net profit was 1874*l.* 15*s.* 11*d.*, which compared with a loss for the previous year of 14,068*l.* 13*s.* 11*d.* The latter figure, however, included an amount of 7785*l.* 12*s.* 5*d.* written off two leases, one of which had since expired, while the other would expire on March 25, 1935.

It was further proved that the debenture in favour of Mr. Morris Bolsom was created in the following circumstances: In the summer of 1932 the goodwill and stock of Dale Manufacturing Company was offered for sale by the trustee in bankruptcy of the proprietors. The company being desirous of acquiring these at a cost of 14,000*l.* Mr. Morris Bolsom lent the company 20,000*l.* in cash to provide it with the necessary funds and a balance available for additional working capital and expansion of the business. In addition to vendor's shares, Mr. Morris Bolsom his wife and family had a considerable holding of shares in the company acquired for cash and were therefore vitally concerned with its prosperity.

Christie K.C. and *J. B. Lindon* for the appellant company.

The Court is asked to sanction the alteration to the memorandum of association but restricting the businesses authorized to those already carried on by the company. The further evidence now put in satisfactorily explains the matters which Eve J. on the evidence then before him thought proper to comment upon. It is also shown that the company's business has so far recovered that there will be a small net profit for the year 1934. In the circumstances it would be proper to sanction the alterations.

Wynn Parry for the opposing shareholders. With the alterations limited in the manner suggested and in view of the additional evidence, the shareholders no longer opposed the application. On the evidence the clothiers' business was the least successful part of the company's business, and it was not entirely desirable that its continuation should be sanctioned.

Lord Hanworth M.R. This appeal must be allowed. It comes before us upon an order made by Eve J. upon a petition presented by the company, Bolsom Bros. (1928), Ld., for the confirmation by the Court, pursuant to s. 5 of the Companies Act, 1929, of an alteration of the company's objects contained in the memorandum of association. The proposed alteration was adopted by special resolution of the company passed on August 31, 1934. Eve J., in his discretion upon the materials then before him, thought it right to make no order, and he refused the petition.

We in this Court have had the advantage of considering the matter in the light of further evidence which has been brought before us and which has certainly elucidated certain matters which appeared to Eve J. to be obscure and upon which he made certain comments. In the light of this further evidence we think it right to say that the matters which were obscure and which, perhaps, gave rise to some doubts, have been cleared up, and we now understand the necessity for this petition. More than that, I think it right to say that the circumstances in which a debenture was issued to Mr. Morris Bolsom have been explained. As a matter of fact he made a considerable advance to the company, in which he is deeply concerned, and as security for the advance which he made he took and holds a debenture which is for an important sum in relation to the capital of the company.

The present company was formed in succession to the company of Bolsom Bros., Ld., and to take over the considerable and diverse business previously carried on by that company. Accordingly, powers were taken in the memorandum of association to purchase and carry on the business which had been previously carried on by Bolsom Bros., Ld. The business which is now carried on is therefore of a diverse character, as was that carried on by Bolsom Bros., Ld. Originally, I think, the business was largely a business in boots and shoes and kindred articles, but that business has not been very prosperous owing to competition from abroad, which, as I understand, is not yet ended. For a considerable time the companies have carried on, and, in particular, this company has carried on, a business in furniture. When I speak of " furniture " I am using that term in a very comprehensive way, because when it is split up, as it has been in a table which has been set before us, it comprises bedding, ironmongery, turnery, household fittings, utensils, ornaments, and the like, and a certain amount of hardware and other things which are used in the household and which would be comprised in any outlay upon furnishing a house.

The reason why there is a petition at all is that doubt was raised at one of the annual meetings of the company whether the company in fact had power to carry on some of the businesses in which its activities were at the time engaged. The company, not being anxious to do anything ultra vires, immediately sought the advice of their solicitors, and their solicitors' advice was that they should make the matter safe by passing a resolution extending the objects, and then applying by way of petition to the Court to sanction the extension. Hence it is that this application has been made, and it is really intended in a large measure to clear up the doubts which have arisen. It is no new thing for the company to carry on a trade in furniture, which is the most important and profitable part of their business; it has been an integral part of the business for a considerable time. I do not want to go through the affidavits, nor is it necessary to go through the catalogues which show what are the present activities of the company. It is sufficient for me to say that, upon the fresh materials which are now before the Court, it has been explained why the Court has been asked to accede to this petition and why it has been found that it would be wise to take what one might call extended powers even covering such matters as jewellery, plated goods, perfumery, soap, and articles required for ornament, the truth being that those are articles which a customer who goes into a considerable store of this kind would like and expect to find available for purchase if he required them.

In those circumstances, and without saying more, I think we are now able, in the light of this further evidence, to accede to the petition, but limiting the order to cover those matters which are included in the table before us and which are marked with a blue pencil mark. From that table there have been struck out a number of items, including some in respect of which it is clear that the company have power under their memorandum. In our opinion the right course would be to make an order to include in the memorandum power to carry on the businesses so marked.

On the question of costs, the company must pay the costs of the respondent shareholders who have appeared before the Court. Their appearance was useful and helpful to the Court. They were entitled to have the matter investigated and to ask the Court, so to speak, to "go slow" until the matter had been fully cleared up. They were right to appear before Eve J. and they were right to appear before this Court, because we have had the advantage of the criticisms they were able to offer on the last occasion and the friendly support to-day which Mr. Wynn Parry has felt able to give.

ROMER L.J. I agree.

MAUGHAM L.J. I agree. I only wish to add that I do not in the least take the view that the learned judge was wrong in dismissing the petition on the materials before him. The matter was brought before him under conditions which were exceedingly unsatisfactory. An order was asked for which involved the company being allowed to extend its memorandum so as to include a large number of businesses which obviously the company did not really desire or hope to carry on at any rate at the present time. For those reasons and for the reasons which Eve J. gave, I think he was right, if I may express the opinion, in dismissing the petition; and, in taking the course which the Court of Appeal is taking now, I also think it is true to say that we are not in any way throwing doubt upon the decision of Neville J. and the statements he made in the well known case of *In re John Brown & Co., Ld.* (1), a case which people who are intending to launch a petition for the Court's approval of an alteration of their memorandum would be wise to bear in mind.

Appeal allowed.

Solicitors: *Simmons & Simmons; Lucien Fior.*

H. C. G.

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(1) 112 L. T. 232.

CONSTANTINIDI *v.* RALLI.

EVE J.

1935
Feb. 22.

[1934. C. 2754.]

Settlement—Rectification—Settlement drafted on written instructions—General power of appointment by will in default of children of settlor—Omission of power to appoint by deed—Defendant appointed to represent presumptive next of kin—Proposed compromise—Affidavit evidence—R. S. C., Order XVI., *rr.* 9A, 32 (*a*), 32 (*b*).

A lady who was entitled to 25,000*l.* in her own right, in 1910 instructed solicitors to prepare a settlement of it on the occasion of her marriage. The settlement contained the usual clauses giving life interests to the wife and husband and then upon trust for the issue of the marriage, and in default of issue in trust for such persons as the settlor should by will appoint and in default of appointment for her next of kin.

This was in accordance with the settlor's written instructions, which did not provide for a power of appointment by deed in default of issue. The husband died in 1932, there having been no issue of the marriage.

The settlor then applied to the trustees for an advance of capital, which they refused to make. She then commenced this action to rectify the settlement by inserting a general power to appoint by deed before the power exercisable by will. A person representative of the class of her presumptive next of kin was made a defendant, and a summons was taken out by the plaintiff to obtain the sanction of the Court to a compromise of the action:—

Held, that as the action could not be tried on affidavit evidence, and as, upon the evidence at present before the Court, it could not be said that the settlement was not made exactly in accordance with the plaintiff's instructions, no case for rectification had been made out, and therefore the Court would not sanction the proposed compromise.

SUMMONS.

On October 1, 1910, the plaintiff, Mrs. Chariclea Constantinidi, was married to her late husband, Antony Sophocles Constantinidi, and in contemplation of that marriage arranged to settle a fund of 25,000*l.* then vested in trustees for her. She instructed a firm of solicitors to prepare the settlement, giving a life interest to her husband after her death, and subject thereto upon the usual trusts for the issue of the marriage or of any future marriage as she should appoint, and in default of appointment equally among her children at twenty-one or marriage, and upon failure of children in trust for such persons as the settlor should by will appoint, and in default of and subject to any such appointment in trust for her next of kin under the Statutes of Distribution. In giving these instructions the settlor wrote that " all capital that I can dispose of will be dealt with according to any will I may make," and that she would state in her will where the money was to go after her husband's death in case she had no children. The settlement was prepared in this form, without any general power of appointment by deed being reserved to the settlor, and having been approved by her was duly executed.

The settlor never had any issue, and her husband died in 1932. She was now fifty-four years of age, and in 1934 brought an action against Sir Strati Ralli and George C. Scaramanga, the trustees of the settlement, claiming rectification thereof by inserting therein a power of appointment by deed immediately before the general power of appointment by will. The defendant Miss Theano Schilizzi was subsequently added, to represent the settlor's presumptive next of kin.

The settlor, who was a lady of Greek origin, contended that in giving instructions for her settlement she was quite ignorant of the meaning of a " power of appointment by deed or will " and believed that an absolute power of disposition by will was equivalent in law to absolute ownership.

The action now came before the Court on a summons to obtain the sanction of the Court to a compromise under which the settlor would release her power of appointment by will over one-fifth of the fund in favour of her next of kin when ascertained, upon terms of having substituted in the settlement for that power, a general power of appointment by deed or will. The compromise was supported by all parties.

A. C. Nesbitt for the plaintiff. The plaintiff approved the form of the settlement, but she did not understand the meaning of a power of appointment. She believed that power to dispose of property by will was equivalent to absolute ownership. No question arose until after her husband's death, when she applied to the trustees for some capital, and was told by them she was not entitled to it. She therefore commenced this action to rectify the settlement by inserting therein a power of appointment by deed immediately before the general power of appointment by will. The defendants to the action are the trustees and a defendant added to represent the plaintiff's presumptive next of kin. The parties have agreed to compromise the action on the terms that the plaintiff shall release her power exercisable by will to the extent of one-fifth of the fund, so that this fifth part will be held by the trustees upon trust for her next of kin at her death, and that there shall be inserted in the settlement a power to appoint by deed over the remaining four-fifths of the fund. The Court has power to sanction such a compromise and it will be for the benefit of all parties to do so. Otherwise the next of kin would get nothing, unless the plaintiff were to die intestate. The Court has power to appoint a party to represent a class not yet in existence, such as the presumptive next of kin: *Tucker* v. *Bennett* (1); *Cook* v. *Fearn* (2); *Smith* v. *Iliffe.* (3) In *Bonhote* v. *Henderson* (4) Kekewich J. held that evidence in a suit for rectification must be oral, and that the evidence there tendered was insufficient, it being affidavit evidence by two old ladies who were too infirm to attend the Court. That was the case of a voluntary settlement, which went to trial. Here the issue of rectification is to be compromised.

H. F. F. Greenland for the trustees of the settlement. The suggestion of compromising the action on these terms is reasonable, the possible alternative of raising money by mortgage of the plaintiff's life interest would be expensive. The Court can sanction a compromise on behalf of infants and unborn persons, if satisfied that it will be for their benefit so to do: see Order XVI., rr. 9A, 32 (*a*), and 32 (*b*). It may be rather difficult to say that unborn persons includes absent persons. If the prospective next of kin cannot be bound, as being unascertained persons, the trustees might be given leave to carry the proposed compromise into effect.

(1) (1887) 38 Ch. D. 1.
(2) (1878) 48 L. J. (Ch.) 63.
(3) (1875) L. R. 20 Eq. 666.
(4) [1895] 1 Ch. 742.

H. S. G. Buckmaster for the defendant Theano Schilizzi. An order such as is asked for must benefit whoever may become the next of kin of the plaintiff at some future date, otherwise they would get nothing if the plaintiff made a will in favour of other persons. In *Tucker* v. *Bennett* (1) the Court made a member of a presumptive class a representative defendant, and the order was confirmed by the Court of Appeal. All parties are agreed that this compromise would be beneficial, and I ask the Court to sanction it.

EVE J. This summons has been launched for the purpose of obtaining the sanction of the Court to a conditional agreement entered into on January 10, 1935, between the plaintiff of the one part and the defendants of the other part, for a compromise of the action. The writ was issued on July 6, 1934. The plaintiff, who is, I gather, a Greek lady (her name is Constantinidi), a widow, claims thereby rectification as therein mentioned of the settlement which was entered into on the occasion of her marriage. The settlement is dated September 29, 1910. To the action as originally framed the surviving trustees were the only defendants, and it was not until a later stage, after the statement of claim had been delivered, that an amendment was made whereby a lady who has also a foreign name was added as one of the persons presumptively entitled under an ultimate trust in the settlement, as one of the settlor's presumptive statutory next of kin. The plaintiff was married on October 1, 1910. She has never had any issue. Her husband died on January 29, 1932, and she is now fifty-four years of age. In contemplation of her marriage she determined to make a settlement of a fund of some 25,000*l.* to which she was absolutely entitled, and for that purpose she took advice and was advised in consultation by certainly one and I think probably both of the gentlemen who had at her express wish agreed to become trustees and stood in the relationship to her of uncles. In due course an eminent firm of solicitors was instructed to prepare a draft settlement. The lady took a more or less active part in

(1) 38 Ch. D. 1.

framing the instructions, and she wrote a letter to the defendant Mr. Scaramanga, who was one of the trustees and was advising her, in which a paragraph of great importance is to be found. On these instructions, communicated by the uncles and reduced into writing by the lady herself, the settlement was drafted in terms to which no exception is taken except in regard to one clause, clause 5, which is as follows: "If no child of the said Chariclea Scouloudi shall attain a vested interest under the trust hereinbefore declared in default of appointment then subject to the trusts and powers herein contained the trust fund and the income and statutory accumulations (if any) of the income thereof or so much thereof as shall not become vested or be applied under any trust or power affecting the same shall after the death of the said Chariclea Scouloudi and such failure of children as aforesaid be held In trust for such person or persons and purposes as the said Chariclea Scouloudi shall by Will or Codicil appoint and in default of and subject to any such appointment In trust for the person or persons who under the statutes for the distribution of the effects of intestates would have become entitled thereto at her death if she had died possessed thereof intestate and without ever having been married such persons if more than one to take as tenants in common in the shares in which they would have taken under the same statutes." It will be observed that there is omitted from that clause the usual power to appoint by deed and the usual trust for the wife absolutely if she should survive her husband. How that omission came about is, I think, shown by the letter to which I have referred. It is one of half a dozen short letters which I must read. It is written by the plaintiff to Mr. Scaramanga under date July 18, 1910. She says: "As it was arranged between us, I am now writing to you about my settlement, and this is what I want to do. I want to put in the settlement that one half of the income of all the property of which I can now dispose, is to be paid to my husband for his life after my death. The rest of the interest and all capital that I can dispose of will be dealt with according to my will"—I think that must be "any will "—" I may make. Would you please have a draft of the settlement made up as soon as possible, as I would like to see it before we leave for Harrogate." She writes again on July 20: "My dear Uncle George, Many thanks for your letter which I received this morning. What I mean to say is, that half of all the income I possess now, to go to Tony for his life "—that is her husband—" the other half I dispose of according to my will. I will also state in my will where the money is to go after Tony's death, in case I have no children. As you know, all the money I have now, with the exception of 4500*l.*, is to be settled, but any money I may inherit at any time, I do not wish to go into the settlement." On the 22nd she writes: "Very many thanks for your letter which I received this morning. You have made everything perfectly clear to me, and you have put things exactly as I wish them to be. So please proceed with the settlement. I return you the two statements as you wished." I suppose those two statements have been lost or mislaid, possibly destroyed, because we have not seen them. Then the solicitors write on July 30 to Messrs. Ralli Brothers (Mr. Ralli being one of the intended trustees): "We beg to hand to you the draft of the settlement to be made on the marriage of Miss Chariclea Scouloudi with Mr. Anthony Sophocles Constantinidi. Under the settlement Miss Scouloudi has the first life interest with a power to appoint by deed or will the funds in favour of her children by any marriage as she pleases. If she has no children, she has a power to appoint the funds by will only in favour of any one she pleases, subject as to one half to the life interest of Mr. Constantinidi if he survive her. If she makes no such appointment by will, the fund belongs to her next of kin, as if she had never married. The effect of this is, that the money is settled during the whole of Miss Scouloudi's life, and if Mr. Constantinidi were to die soon after the marriage and there was no issue, the money would still be settled." One could not imagine the position being put more clearly than it is in that letter. In the event (which unfortunately has happened) of the husband dying in the wife's lifetime and there being no issue of the marriage, the property will still remain in settlement. The plaintiff writes to her uncle again on August 4: "Many thanks for your letter. As we are short of time, we did not intend staying in London either going or coming back. I thought perhaps if you sent me the draft of the settlement I could show it to my solicitor in Manchester, who is an exceedingly nice man, and whom I know very well. In fact, it is with him I have made my old will, and am going to make my new one. Is it absolutely necessary for me to sign the settlement a few days before my wedding, or could I do it on that day?" She visited the solicitor in Manchester and handed him the draft, and he looked at it. We have an affidavit from him which I will read presently saying that he really did not take it upon himself to advise her as to the terms. Then the solicitors write back and answer the letter that Mr. Scaramanga had received: "In compliance with your letter of yesterday's date to our Mr. G. C. Scaramanga, we beg to enclose the draft of your marriage settlement and a copy of Messrs. Freshfields letter to us of July 30th in explanation of the same." That brought to her notice the letter from the solicitors which explained the matter in the most explicit manner: "Please let us have the draft back in good time so that we may have it engrossed and ready for signature. The deed must be signed a few days before your marriage and not on the day of your wedding." She replies: "My dear Uncle George, I am sending you back the draft of the settlement. I have gone over it with my solicitor, and find it all right. The sooner you send it to me to sign after our return from Paris the better it would suit me, for the last few days I will be frightfully busy. Very many thanks for all the trouble you have taken over it for me," and so on. The engrossment was sent to Messrs. Ralli on September 5, and on the 29th she returned to them the deed duly executed.

It would not be possible to say that the lady did not take an unusual part in the negotiations, or that the contract which was made was carried out without her instructions, and indeed the statement of claim does not shirk that position, because when we come to look at it in a moment we shall find that it admits the settlement. The deed, as executed, is the lady's deed, made according to her express instructions, but she unfortunately did not appreciate that the concluding paragraph did not include, as it might have done and as it would generally have done, a power to appoint by deed to herself. In the statement of claim delivered before Mr. Buckmaster's client had been unearthed or made a party to these proceedings, Mr. Nesbitt in para. 4 points out the matter which has been omitted. He also refers to the letter which was no doubt the reason for the ultimate trust being framed as it was. All he can say in regard to that is this: " The plaintiff was not well versed in the terms and phraseology of lawyers and the instructions for the settlement which she gave provided only for a life interest for the husband and that 'all capital that I can dispose of will be dealt with according to any will I may make' "—and then he gives the rest of the letter. The paragraph goes on: " The plaintiff in giving these instructions was quite ignorant of the meaning of 'powers of appointment by deed or will' and she believed that an absolute power of disposition by will was equivalent in law to absolute ownership." The statement of claim sets out accurately all the instructions and alleges in para. 7 that the plaintiff at the time of executing the said settlement believed that the same contained provisions under which if she survived her husband and had no child the settled property would be at her absolute disposal and that the instructions given by her (although followed literally in the said settlement) did not reflect her true mind or intention at the time of making the same and that she never intended the same and in that respect she executed the said settlement under a mistake. There is not really any indication in the letters I have read or in anything the plaintiff communicated to her uncles or to the solicitors which shows that the settlement did not as it stood carry our her intentions, or that she had any intentions different from those which she clearly expressed in the instructions which she herself gave. According to her it was only after the death of the husband when she wanted some capital money and in 1933 applied to the trustees that she learned for the first time that she could not have any capital.

The statement of claim was amended in October, 1934, by adding Mr. Buckmaster's client, as one having a presumptive interest in so much of the fund as would pass to the next of kin in default of a testamentary appointment by the plaintiff. It does not follow that this lady will ever be one of the next of kin. At this moment if the settlor were to die she would be, but the class cannot be ascertained, nor, as it seems to me, can the added defendant be appointed to represent the class. But there are other matters which I think are of paramount importance and which compel me to say that I cannot do that which is asked by the summons—namely, approve this compromise. No defences were delivered in the action, and Mr. Nesbitt's difficulty, as also mine, is that it is very difficult to know what might or would transpire if the matter were dealt with by a trial and if the lady was submitted to cross-examination.

The parties to the agreement are the settlor, and I suppose one must say the next of kin—the lady who has been added to represent a class which does not exist—and the trustees. It recites the settlement ; it recites in full clause 5, and refers to her having power in the event of re-marriage to make a further settlement. Then after stating the fact of the husband's death and so on, and the institution of this action, setting out the material parts of the statement of claim, it contains this clause : " With a view to compromising the said action Mrs. Constantinidi," the settlor, " has offered to release her testamentary power of appointment under clause 5 of the said settlement so far as regards one equal fifth part of the trust fund " (the trust fund being some 25,000*l.*, that would be 5000*l.*) " and the income thereof to the intent that in the event of Mrs. Constantinidi having no child hereafter born to her the interests of her statutory next of kin may be absolute and indefeasible in consideration of the trusts of clause 5 being treated as varied by providing that in the same event Mrs. Constantinidi be empowered to appoint by deed revocable or irrevocable as well as by will or codicil the remaining four equal fifth parts of the trust fund and the income thereof to or for the benefit of such person or persons and for such purposes as she may think fit."

That is the agreement which I am asked to sanction and approve in terms which will be adequate to secure to the next of kin their one-fifth and would protect the trustees and Mr. Buckmaster's client also in regard to any steps they may have taken. As I have already intimated, I do not feel justified in so doing. In the first place I have to bear in mind that this is the lady's deed ; it is not a case where she has executed something about which she did not give instructions. She admits : "This is what I told them to do. They did it. Had I known a little more about the law affecting these matters I should have told them something else, and that something else would have had this effect, that it would not have resulted in my property being settled so that I could not deal with it in the events which have happened." But that was the very point to which Messrs. Freshfields drew attention in their letter enclosing the draft. After stating adequately the nature of the trust, they said : "The effect of this is that this property will remain in settlement during your life." It is impossible, I should have thought, to find a clearer case where there is no room for saying "My mind did not follow my pen in executing this settlement." The lady must be taken to have known—I think she did know ; she herself originated the instructions out of which this ultimately emerged—that there was a provision under which the property would still remain in settlement should she survive her husband and have no child. At the trial it may turn out that I am mistaken and some facts may then be elicited which will satisfy the Court that what was done was not in accord with her intentions ; but at this stage, with nothing but this statement of claim on the record, would it be right to say that there are sufficient grounds for sanctioning this agreement ? I think not and am not sufficiently instructed and could not, as the matter stands, be sufficiently instructed to determine whether there is anything in this claim. As at present advised I think the lady will have great difficulty in making out any case for rectification.

I said I would allude to what happened at Manchester. The plaintiff's solicitor there says in his affidavit: " In regard to the occasion in the autumn of 1910 on which the plaintiff states that in the company of her stepmother Mrs. Henrietta Scouloudi she called at my office, I believe I was at that time conducting some business on behalf of Mrs. Scouloudi. I do not remember that the plaintiff had herself arranged any appointment with me, nor was any attendance entered against her in my firm's books nor was any charge made. I have difficulty in remembering exactly what took place at the interview in question, but after discussing the matter several times with the plaintiff I believe I am accurately describing what happened when I say that she handed me a draft of her proposed marriage settlement. I believe I first asked who had prepared it and she told me it was prepared by Messrs. Freshfields & Leese on her behalf instructed by her trustees, that she then asked me whether the provision she desired to make for her husband had been effectually made "—that was, half to him for life and then after that it was still to remain in settlement. " I looked at the settlement and verified this. I knew that the settlement had been drawn by eminent solicitors in London and to the best of my memory I did not go through its various clauses as I considered in the circumstances that this was unnecessary. My memory is that I confined my attention to the one point above mentioned "—that is most important; that is *the* point—" and did not in any way discuss or explain the settlement as a whole." It seems she went to him because she was anxious about this clause—why, I do not know. It was the clause to which her attention had been directed by Messrs. Freshfields, and it is the one to which she called Mr. Cobbett's attention and on which she consulted him in Manchester.

I think there is an accumulation of facts which precludes, and must preclude, the plaintiff from succeeding in rectifying the settlement. It is obviously not a case which the Court

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would decide upon mere affidavit evidence: *Bonhote* v. *Henderson* (1); there would have to be cross-examination and the whole matter would have to be determined after oral evidence had been given. In that state of things, and having very grave doubt whether I have anybody before the Court except the trustees to represent a class which cannot at present be identified, I do not think I can do anything but dismiss this summons and make the costs costs in the action.

Solicitors: *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester; Freshfields, Leese & Munns.*

H. L. L.

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COUTTS AND COMPANY *v.* SOMERVILLE.

[1934. C. No. 3240.]

Mortgagor and Mortgagee—Lease by Mortgagor—Best rent obtainable in the circumstances—Improvement of mortgaged premises by the Mortgagor—Covenant by Mortgagor to pay the rates—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 99.

A mortgagor granted a lease of the mortgaged property to his son-in-law without any independent bargaining, and in the lease covenanted to pay the rates. The mortgagor effected great improvements on the mortgaged premises which might increase the rateable value of the premises. The mortgagee claimed that the improvements and the covenant had rendered the rent under the lease not the best rent reasonably obtainable in the circumstances, and that the lease was void under s. 99 of the Law of Property Act, 1925:—

Held, that, in the absence of any covenant by the landlord to effect improvements which might increase the rateable value of the property or of any actual increase of the rateable value the covenant to pay the rates, though unusual in the case of a lease for a long term, was not sufficient to render the rent reserved not the best rent reasonably obtainable, and that upon the evidence the rent reserved was, having regard to the condition of the property at the time when the lease was granted, the best rent reasonably obtainable, and the action by the mortgagee failed.

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(1) [1895] 1 Ch. 742.

WITNESS ACTION.

Coutts & Co. are bankers and a company incorporated with unlimited liability and are hereinafter described as "the Bank." On or before June 4, 1927, Walter James Fryer deposited with the Bank the title deeds relating to an estate at Sonning in the county of Berkshire known as the Holme Park Estate.

By a memorandum in writing dated June 4, 1927, the said Walter James Fryer charged in favour of the Bank any securities or deeds of his which might at any time be in the custody of the Bank with the repayment of an advance of 24,000*l.* which the Bank had agreed to make and subsequently made to him, and undertook to execute any more formal charge over the said deeds whenever the Bank called on him to do so.

By a further memorandum in writing dated November 7, 1927, the said Walter James Fryer charged in favour of the Bank (inter alia) the deeds of the Holme Park Estate with the repayment of a further advance of 24,000*l.* which the Bank had agreed to make, and subsequently made to him, and undertook to execute a more formal charge therefor when called upon to do so. By further memoranda in writing dated respectively May 11, 1928, and September 21, 1929, the said William James Fryer further charged the securities in the hands of the Bank to secure further advances to him which the Bank had made to him.

In the month of March, 1933, the Bank requested the said William James Fryer to execute a legal mortgage to the Bank of (inter alia) all the lands at Sonning owned by him of which the Bank held the title deeds, and it was agreed that such mortgage should contain a clause to the effect that the statutory power of leasing was only to be executed with the consent of the Bank.

By a tenancy agreement dated May 12, 1933, and made between the said William James Fryer of the one part and Leslie Lloyd Somerville (who was the son-in-law of the said William James Fryer) of the other part, the said William James Fryer, without the consent of the Bank, agreed to let and the said Leslie Lloyd Somerville agreed to take Holme Farmhouse and the land shown on the plan attached thereto (forming part of the Holme Park Estate) for a term of twenty-one years from May 29, 1933, at the yearly rent of 125*l.* By the agreement the tenant agreed not to assign, underlet or part with the possession of the said premises or any part thereof without the written consent of the landlord, and the landlord agreed to pay the rates and taxes imposed on or in respect of the said premises and to be responsible for the maintenance and repair of the roofs drains and structural work. The said Leslie Lloyd Somerville at once entered into, and was then in, possession of or in receipt of the rents of the premises comprised in the agreement.

By a mortgage dated May 19, 1933, and made between the said William James Fryer of the one part and the Bank of the other part the said William James Fryer demised to the Bank (inter alia) the Holme Park Estate for a term of 1000 years from the date thereof to secure the sum of 47,654*l.* 6*s.* 2*d.* and other moneys owing by him to the Bank as therein mentioned and interest thereon. It was provided that the powers and remedies of the Bank under the mortgage should operate without prejudice to and by way of addition to the powers and remedies of the Bank under the said memoranda, or any or either of them, and all other securities of any nature held by the Bank in respect of any indebtedness of Fryer to the Bank on any account whatsoever, all which last mentioned powers and remedies should remain and be exercisable by the Bank as though the mortgage had not been executed; and that Fryer should not exercise the statutory powers of leasing or agreeing to lease without the consent in writing of the Bank.

By an agreement of under-tenancy dated September 29, 1933, the said Leslie Lloyd Somerville agreed to let to Homestead Farm, Ld., the land comprised in the tenancy agreement of May 12, 1933, other than the buildings therein called Holme Park House, for the term of twenty years from September 29, 1933, at the yearly rent of 120*l.* The said company entered into possession of the said land and carried on therein the business of a pig farm.

The nature of Holme Park House and the land comprised in the tenancy agreement and the dealings therewith are fully set out in the judgment. The Bank did not know of either of the said tenancy agreements until on or about June 4, 1934, when they came to the knowledge of the Bank's surveyor. The Bank claimed that the tenancy agreement of May 12, 1933, was not binding upon the Bank, as the rent reserved thereby was not the best rent that could reasonably be obtained having regard to the circumstances of the case.

By an agreement dated June 29, 1934, and made between the Bank of the one part and Percy Somers Joyce of the other part, the Bank agreed to sell to Percy Somers Joyce part of the Holme Park Estate (including the land comprised in the tenancy agreement of May 12, 1933) for the sum of 33,000*l.*, subject to the said tenancy agreement, if and so far as the same was binding on the Bank, and the Bank agreed to assign to Joyce, so far as they lawfully could, the benefit of their right, if any, to repudiate the said tenancy agreement.

On October 3, 1934, the Bank and the said Percy Somers Joyce commenced this action against the said Leslie Lloyd Somerville and Homestead Farm, Ld. for a declaration that the tenancy agreement of May 12, 1933, and the sub-tenancy agreement of September 29, 1933, were respectively not binding on the plaintiffs by reason of the rent reserved by the tenancy agreement not being the best rent reasonably obtainable, and for possession of the house and land comprised respectively in the said tenancy agreement and the sub-tenancy agreement.

At the hearing evidence was given as to the nature of the property comprised in the said agreements and as to the dealings therewith by the said Walter James Fryer and Leslie Lloyd Somerville which is sufficiently set out in the judgment.

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Sir Gerald Hurst K.C. and *E. G. Rand* appeared for the plaintiffs.

R. F. Roxburgh K.C. and *A. C. Nesbitt* for the defendant Somerville.

A. C. Nesbitt for the defendants Homestead Farm, Ld.

LUXMOORE J. [after stating the nature of the plaintiffs' claim, continued:] The ground on which the declaration is sought is that the lease of May 12, 1933, being by a mortgagor in possession, does not comply with the requirements of s. 99 of the Law of Property Act, 1925. This section confers the statutory power of leasing on mortgagors and mortgagees respectively in possession of mortgaged land. It is to be observed that the section imposes a limit on the term which can be granted, and requires that the lease shall take effect in possession not later than twelve months after its date, and that the rent reserved shall be the best rent that can reasonably be obtained, having regard to the circumstances of the case, but without taking fines. The section contains no provision as to the covenants which may be inserted in the lease, except that there must be a covenant for the payment of rent, and also a condition of re-entry on non-payment of rent within a specified time, which must not exceed thirty days. The sole ground on which the lease is impeached in this action is that the rent reserved is not the best rent which could reasonably have been obtained having regard to the circumstances of the case.

The facts of the case are peculiar and perhaps give rise to a certain amount of suspicion. Sir Gerald Hurst, both in his opening and in his cross-examination of the defendant Somerville, suggested that the grant of the lease was a colourable attempt by the lessor to obtain an advantage for himself, if indeed he was not beneficially entitled to the lease. Nothing in the pleadings warranted any such case being put forward, and, as I have already said, the argument was confined to the single question of the sufficiency or otherwise of the rent reserved.

The facts are as follows: [his Lordship then stated the circumstances leading up to the execution of the mortgage, and continued:] On May 12, 1933, Mr. Fryer executed the tenancy agreement in question. It is expressed to be made between Mr. Fryer of the one part and Mr. Somerville of the other part. By it the landlord agrees to let and the tenant agrees to take all that messuage or dwelling-house known as Holme Farm House together with the ground and all outbuildings thereon as shown on the plan attached to the lease for twenty-one years from May 9, 1933, determinable as thereinafter mentioned, at the yearly rent of 125*l.*, payable by equal quarterly instalments on the days therein mentioned. The lease contained covenants to pay the rent, to keep the messuage and premises and all fixtures and fittings in and about the same in good tenantable repair, order and condition, also the sanitary and water apparatus and the fittings thereof in thorough substantial repair, order and condition, and at the expiration or sooner determination of the said term to deliver up to the landlord in the same substantial repair, order and decorative condition as at that time. There are a number of other covenants, all of them more or less usual in form, but none of them appear to have any particular materiality to the issue which I have to try, except those which are numbered 14 and 16. No. 14 is in these terms: "The landlord agrees to pay all rates taxes and insurance imposed in respect of the said premises" and No. 16 is: "The landlord agrees to be responsible for the maintenance and repair of the roofs drains and structural work." This lease was made by Mr. Fryer to Mr. Somerville, who was his son-in-law. There had been some suggestion by Mrs. Somerville, who was Mr. Fryer's daughter, before its execution, that she would like to live in part of the property comprised in the lease. There were negotiations as to the terms, and when Mr. Fryer gave it to his son-in-law he said that he, Mr. Fryer, intended to make such alterations to the property and to put it in such a state of decoration and repair that Mr. and Mrs. Somerville might live there. At this time Mr. Somerville's resources were insufficient to enable him to support his wife and himself in the manner in which they were accustomed to live.

Mr. Somerville frankly admitted that his private income was hardly more than sufficient to enable him to meet the rent reserved by the lease.

After the lease was granted Mr. Fryer instructed a builder named Russell to do work on the premises. Before referring to this work it is, I think, material to state in what condition the premises were on May 12, 1933. They consisted of a block of three cottages, all under the same roof. This block was originally the Holme Park Farmhouse, and was apparently so named. The cottage at the north had been occupied by Mr. Fryer's bailiff, and the other two were occupied by farm hands. There was no hot water supply in any of these cottages. There was a bath in the bailiff's cottage which could not be used, and the sanitary arrangements were certainly not up to modern standards. Water was laid on, but there was no gas or electricity. In addition to those cottages there was a bungalow with two rooms occupied by a pensioner; it had resulted from the conversion of a calving shed. In addition to the cottages and bungalow there was a large barn which was used as a stable for the farm-horses, another barn for sheltering cattle and also for the storage of farm implements, and a long, low range of buildings, one half of which was used for standing the cows while they were being milked, and the other half of which had been converted into loose boxes for some hunters kept by Mr. Fryer. There were other and smaller farm buildings, and in addition there was a farm-yard and another yard which was gravelled. This yard was in front of the three cottages and was used in part as a stock-yard. The whole of the premises comprised an area of about 3½ acres. The approach was by a lane leading from Sonning Lane, and this approach was not metalled, although I think that it had a gravelled surface.

After the lease was granted Mr. Fryer at his own expense converted the bailiff's cottage and the cottage next to it into a dwelling-house. Two bath-rooms were constructed, the kitchen was rearranged, the walls and roof were repaired, a study was built on, and the whole building was modernized and brought up to date; basins with hot and cold water were fitted in the bedrooms, and electric light and gas were laid on, new fire-places were constructed, and a modern cooking range was installed. This work was finished about September, 1933. By that time the house was, according to the evidence, an attractive residence.

I have no information as to the total cost of these alterations and improvements, but Mr. Russell, the builder who did some of the work, was paid 300*l.* for his work. Expert evidence was called by the plaintiffs as to the letting value of these premises. Mr. Fraser, a member of the well known firm of Nicholas, who was well acquainted with the Sonning district, said that, in his opinion, the present letting value was 250*l.* per annum ; but he admitted frankly that he never went over the premises until January this year, and that he knew nothing of the state of the property in May, 1933. Mr. Dunn, who is a partner in the firm of Simmons & Son, of Reading and Henley-on-Thames, agreed with Mr. Fraser's opinion as to the present letting value of the property, but he did not go over the property until September, 1933 ; he was not able to speak of the condition of the property on May 12, 1933, and was therefore unable to express an opinion as to its letting value at that date. It was evident that the plaintiffs and their advisers were unaware that any alterations had been made to the property after May 12, 1933, until after the evidence on behalf of the defendants had been given. The main evidence on behalf of the defendants was given by Mr. France and Mr. Russell. Mr. France is the manager of Messrs. Wilson & Co. He went over the property in September, 1931, and made on Mr. Fryer's instructions a valuation of the Holme Park Estate as a whole at that time. His description agrees in the main features with the fuller description subsequently given by Mr. Russell, the builder, to whose evidence I have already referred. He stated that in May, 1933, the three cottages were worth respectively, twelve to fourteen shillings per week for the bailiff's cottage, nine to ten shillings per week for the cottage next to it, and seven to eight shillings per week for the third cottage, while the bungalow was worth, in his opinion, about five shillings per week. He thought that it would be difficult to let any of the additional land or to get any rent for that part of the property, if let separately, but he put the whole letting value at 120*l.* per annum before the alteration, on the basis of the landlord paying the rates, taxes and insurance. Mr. Russell was the only witness able to speak positively as to the condition of the property in May, 1933. He went over it at the invitation of Mr. Fryer on May 17, 1933, and was given verbal instructions as to the work he was to carry out. I have already stated the effect of his evidence as to the condition of the property. On that evidence, which I accept, it is clear that the property required very considerable work, repair, and redecoration to make it suitable for a residence. On the evidence before me I think it is plain that on May 12, 1933, the value of the property was certainly not more than 125*l.* a year; indeed, it seems to me that it may have been considerably below that figure.

The only difficulty in the case is caused by the presence of the covenant by the landlord to pay the rates. Taxes are usually paid by the landlord, and the insurance is a negligible matter. There is no covenant by the landlord to do any work on the property. There may have been some express agreement to that effect, but I have no sufficient evidence to come to a definite conclusion on that point.

The question I have to determine is whether the existence of this covenant to pay the rates is in the circumstances one that I ought to take into consideration when deciding whether the rent reserved by the lease was the best rent reasonably obtainable in the circumstances for the property included in the lease. As I have said, there was no obligation on the mortgagor to spend any money on the property, and I do not think that the mortgagee is entitled to say that the rent is not the best rent reasonably obtainable for a particular property by reference to its condition after voluntary expenditure at a date subsequent to the date of the lease in question. The rent must be considered in reference to the property at the date of the lease. It is said that the subsequent expenditure may put a very heavy burden upon the mortgagee, because by reason of it the rateable value may be increased and, as the landlord is liable under the lease

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for the rates, the actual rent received will be diminished. It is agreed that in a short letting of property in the state in which this property was at the date of the lease, with a number of cottages suitable for letting at weekly rents, it is usual for the landlord to pay the rates; but it is certainly unusual for the landlord to covenant to pay the rates in respect of property which is let for a long term. If the property is to be kept during the term in the same state as it was at the beginning of the lease there would, as far as I can see, be no objection to the covenant, for the rates might go up or they might go down. It is said, however, that such a covenant in a long term must affect the rent reserved prejudicially, if it is possible to alter the property by improvements of a sufficiently substantial nature so as to increase materially the rateable value of the property. There was no direct evidence as to the present rateable value of the property. Indeed it was suggested that during the present year the rates were something under 6*l.* There was no evidence that a higher rent could have been obtained by reason of the landlord's covenant to pay the rates. It is true that Mr. Fraser said that he could put no monetary value on the covenant, but he thought it would make a considerable difference. It might well be that a tenant would refuse to accept a lease at a higher rental in consideration of the insertion of such a covenant. I think that, in the absence of any agreement by the landlord to improve the property in such a way as to increase the rateable value, I cannot treat the presence of the covenant as a circumstance sufficient to warrant a finding that the rent reserved is not the best rent reasonably obtainable. On the facts I am satisfied that the rental of 125*l.* a year reserved by the lease was the best rent reasonably obtainable for the property in the condition in which it was at the date of the lease, and I do not think that I should be justified on the evidence, or perhaps I should say on the lack of it, as to the increase or possibility of increase in the rateable value by reason of subsequent alterations in holding that it was not.

Sir Gerald Hurst argued that in fact there was no attempt to ascertain whether a higher rental could be obtained from any independent source, and he argued that that by itself was a sufficient ground for holding that the rent reserved was not the best rent reasonably obtainable. I am unable to accede to that argument. I agree that the fact that the parties to the lease were not at arm's length, and that there was no independent bargaining before the lease was granted, demands a more critical consideration of the question whether the rent reserved was a proper rent or not and of the evidence with regard to it than if the parties were strangers. But the matter does not end there, for I am satisfied that the property, as it was at the commencement of the lease, was not worth more than 125*l*. per annum, and was in all probability worth less. I do not think that I am justified in taking into consideration the intention of the landlord to expend his own moneys on the improvement of the property after the lease was granted, even though that intention was notified to the tenant before the lease was granted. These facts might or might not be material to another aspect of the case, but, as I have already said, that aspect is not raised, and cannot be considered in this action. In the result, it is impossible for me to hold that in all the circumstances of the case the rent of 125*l*. per annum reserved by the lease was not the best rent reasonably obtainable, and the action therefore fails.

I have not dealt with the position of the second defendants; but it is sufficient to say that on October 16, 1933, Mr. Somerville granted to them an underlease of part of the property included in the original lease, being that part other than the residence and the cottage, and part of the land, reserving the other part. The rent reserved by the underlease was 120*l*. per annum. The underlease was granted to enable the second defendants to carry on a pig farm. I do not think that the rent reserved by underlease demonstrates that the rent reserved by the original lease was not the best rent reasonably obtainable at the date of its execution, and beyond this the underlease has no bearing on the case.

In the result the action fails against both defendants, and will be dismissed with costs.

Solicitors: *Farrer & Co.; Holt Beever & Co.*

E. K. C.

In re JAMES.

JAMES *v.* JAMES.

FARWELL
J.

1935
Feb. 21.

[1934. J. 1129.]

Administration—Imperfect Gift—Donor's father expresses intention to leave house and premises to donee—On death of father donor hands over furniture and title deeds to donee—Death of donor intestate—Donee appointed administrator.

The legal estate acquired by an administrator is no less effectual than that of an executor appointed by will to perfect an imperfect gift made by the deceased owner of the estate to the administrator.

On the death of his father, J. J. handed over the furniture and title deeds of a certain house and premises, forming part of his father's estate, to S. M. J. and allowed her to occupy the house rent free. J. J. died intestate, and S. M. J. was appointed an administratrix :—

Held, that there was a continuing intention on the part of the donor up to the time of his death to give the property to the donee, and that by her appointment as an administratrix she had acquired the legal estate.

ADJOURNED SUMMONS.

John James, the deceased, died on June 17, 1933, a bachelor and intestate, and letters of administration were granted to the plaintiff and the defendant, Sarah Maria James. James James, the father of the deceased, lived at premises known as Green Vale, of which he was the owner. He died on January 24, 1924, a widower and intestate, leaving the deceased his only child him surviving. The defendant was in the employ of James James from 1905 until his death as his housekeeper. She received no payment from him for her services, but from time to time he stated that Green Vale and his furniture were to be hers on his death.

On the death of James James, the deceased took away from Green Vale a few small articles (jugs, basins, etc.), but he handed over all the rest of the furniture and also the title deeds to the defendant. She and her husband continued to

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reside at Green Vale until the death of the deceased, and they still continue to do so. She occupied the house rent free.

The defendant claimed that she was entitled to Green Vale as beneficial owner, and the summons asked whether the plaintiff ought to admit her claim.

Lightwood for the plaintiff. There is no doubt that if the deceased had executed a will by which he appointed the defendant to be an executrix she would take as beneficial owner, because by his own act he would have perfected an imperfect gift. But that is not the case here. There is no case where an appointment as administrator has been held to perfect an imperfect gift. To hold that such an appointment would perfect an imperfect gift would be a very great extension of the law. Even if the principle were to extend to an administrator, it would not extend to one of two administrators.

A. L. Ungoed-Thomas for the defendant. The imperfect gift has been perfected by the appointment of the defendant as administratrix. The gift was imperfect because of the omission of a legal formality sufficient to pass the legal estate. The appointment of the defendant as administratrix has provided that formality and perfected the gift: *Strong* v. *Bird* (1); *In re Pink* (2); and *Carter* v. *Hungerford.* (3) No virtue is attached to the passing of the legal estate being the act of the donor. The authorities establish that there is no need of any intention on the part of the donor, at the time of the act, to complete the gift by passing the legal estate, or even to pass the legal estate at all. It is established that it is sufficient if the donor passes the legal estate accidentally. The emphasis is laid, not on any intention or attitude or act of the donor where the legal estate is passed, but on the acquisition of the legal estate by the donee. *In re Stewart* (4) shows that the appointment of one of two executors is sufficient. The whole of the legal estate vests in each executor and administrator, and the test is satisfied whenever the donee becomes one of two or more joint tenants.

(1) (1874) L. R. 18 Eq. 315.

(2) [1912] 2 Ch. 528.

(3) [1917] 1 Ch. 260.

(4) [1908] 2 Ch. 251.

FARWELL J. I am completely satisfied on the evidence before me that there was a continuing intention in the donor up to the time of his death to give the property to the defendant.

At the time of his death the position was that the defendant was in possession both of the property and the title deeds as donee from the intestate; but the legal estate in the property was still in the donor. The case was argued on behalf of the defendant on the footing that the position was the same as in a case of an imperfect gift of personalty and I do not therefore propose to consider whether possession of the title deeds and the property gave the defendant an equitable interest in the land which she could have successfully asserted. I will deal with it as though it were an imperfect gift of personalty. It is now well settled that in such a case equity will not aid the donee, but on the other hand if the donee gets the legal title to the property vested in him he no longer wants the assistance of equity and is entitled to rely on his legal title as against the donor or persons claiming through him: see *Strong* v. *Bird*. (1) In my judgment those principles apply here. The defendant by her appointment as one of the administratrices has got the legal estate vested in her and she needs no assistance from equity to complete her title. Under these circumstances she cannot be compelled at the suit of persons claiming through the donor to surrender her property. It follows that in my judgment the plaintiff here must recognize the title of the defendant to the property and no steps should be taken to recover it from her.

Solicitors for the plaintiff: *Helder, Roberts, Giles & Co., for Morgan Griffiths, Son & Prosser, Carmarthen.*

Solicitors for the defendant: *Rhys Roberts & Co., for Ungoed-Thomas & King, Carmarthen.*

P. J. B.

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(1) L. R. 18 Eq. 315.

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Feb. 28; March 1, 5.

STUART *v.* HAUGHLEY PAROCHIAL CHURCH COUNCIL.

[1934. S. 1698.]

Parochial church council—Electoral roll—Removal of name—Appeal to lay electoral commission—Order for restoration of name to roll—Jurisdiction—Representation of the Laity Measure, 1929.

A person whose name was removed by the parochial church council from the electoral roll of a parish appealed to the lay electoral commission—the appellate tribunal constituted under r. 18 of the Representation of the Laity Measure, 1929. The commission, after obtaining from the council their reasons in writing for the removal of the name, came to a decision that the appeal ought to be allowed and directed that the name should be restored to the roll.

The council failed to comply with these directions, and the parishioner whose name had been removed commenced an action in which he sought an order directing the council to reinstate his name on the roll and an injunction restraining the council from preventing him from attending and voting at church parochial meetings:—

Held, that the commission, in coming to their decision, had acted honestly and in good faith and that the Court had no jurisdiction to interfere with that decision; that the name of the plaintiff must be restored to the roll and that he was entitled to the injunction for which he asked.

Maclean v. *The Workers' Union* [1929] 1 Ch. 602 followed.

ACTION.

The plaintiff, whose name had been removed from the church electoral roll of a parish, commenced this action against the parochial church council, the vicar, the secretary (at all material times) of the council and the present secretary of the council for (1.) a declaration that he was entitled to have his name reinstated on the roll; (2.) an order directing the council and/or the present secretary of the council to reinstate the plaintiff's name on the roll; and (3.) an injunction restraining the defendants and each of them from restraining or in any way interfering with the plaintiff attending and voting at church parochial meetings of the parish or exercising any other rights or privileges vested in him as a person whose name was entered on the roll.

The following statement of the facts is taken from his Lordship's judgment :—

The parties to this action are as plaintiff Mr. Edmund Cuthbert Stuart and as defendants the parochial church council of the parish of Haughley, the Reverend Walter Grange White, who is the vicar of that parish, Mr. Frederick Harper and Mr. John W. Nunn, the first of whom has been, and the second is, the secretary of the parochial church council of the parish of Haughley. The action is brought by the plaintiff for the purpose of establishing his right to be on the church electoral roll of the parish of Haughley and to attend the parochial church meeting of that parish which was held on February 1, 1934. The rights which the plaintiff is asserting are not without importance to those persons who desire to exercise the rights which Parliament has conferred upon them of taking their part as laymen in the affairs of the Church of England. The plaintiff's rights depend upon the provisions of the Representation of the Laity Measure, 1929, a Measure passed by the National Assembly of the Church of England, in the Schedule to which are stated the rights conferred upon laymen in regard to the National Assembly of the Church of England. Rule 2 of the Schedule, sub-r. 1, provides : " The laity shall meet in parochial church meetings and be represented in (i) parochial church councils ; (ii) ruri-decanal conferences where such conferences exist ; (iii) diocesan conferences ; and (iv) the House of Laity, by representatives of either sex (in these rules referred to as ' lay representatives ') who are actual lay communicant members of the Church of England of twenty-one years of age and upwards." Rule 3 provides by sub-r. 1 that " There shall be a church electoral roll (in these rules referred to as ' the roll ') in every parish." By sub-r. 2 that : " the persons entitled to have their names entered upon the roll of a parish shall be lay members of the Church of England of either sex, of eighteen years of age and upwards, who—(*a*) are baptized and declare that they are members of the Church of England and that they do not belong to any religious body which is not in communion with the Church of England ; and (*b*) are resident in the parish or (whether or not so resident) have habitually attended public worship in the parish during a period of six months prior to enrolment ; and (*c*) have signed the form of application for enrolment set out in Appendix I. to these rules " ; by sub-r. 3 that " no person shall be entitled to be upon the roll of more than one parish in the same diocese." Sub-r. 4 : " The roll shall, until a parochial church council (in these rules referred to as ' the council ') has been constituted in a parish be formed and revised by the minister and churchwardens (if any) and shall, after a council has been constituted, be kept and revised by the council." Sub-r. 5 : " The names of persons who are entitled to have their names entered upon the roll of a parish shall, subject to the provisions of these rules, be from time to time added to the roll by or under the direction of the council." Sub-r. 6 : " The names of persons who have ceased to be entitled to be upon the roll of a parish, or who have signified in writing their desire that their names shall be removed from the roll, may, subject to the provisions of these rules, be at any time removed from the roll by or under the direction of the council." Sub-r. 7 : " The roll of a parish shall be revised annually by or under the direction of the council, such revision being effected pursuant to a public notice in the form set out in Appendix II. to these rules (or in a substantially similar form), given not less than fourteen days before the commencement of the revision. The revision shall be completed not less than fifteen days or more than twenty-eight days before the annual parochial church meeting." Sub-r. 8 : " Upon every revision all enrolments or removals from the roll which have been effected since the date of the last revision (or since the formation of the roll, if there has been no previous revision) shall be verified, and such further enrolments or removals from the roll as may be required shall be effected." Sub-r. 9 : " After the completion of the revision the roll as revised (or the roll as originally formed in any case where there has not been any revision thereof) shall, together with a list of the names of the persons removed from the roll since the last revision, be published by being exhibited continuously for not less than fourteen days before the annual parochial church meeting on or near to the principal door of the church in such manner as the council shall appoint, and no name shall be entered upon or removed from the roll during the period in any year between the completion of the revision and the annual parochial church meeting." Sub-r. 10: "Any person desiring to continue upon the roll of a parish after he has ceased to be resident in that parish, and being qualified by habitual attendance at public worship, shall make a fresh application for enrolment in the form set out in Appendix I. to these rules."

Those are the provisions with respect to the church electoral roll. Rule 5 provides for the annual parochial church meeting. By sub-r. 1 of that rule it is provided: "In every parish there shall be held annually not later in the year than in Easter week or in the following week the annual parochial church meeting of all persons whose names are entered upon the roll of the parish (in these rules referred to as 'the annual meeting).'

Then there are provisions for the convention of the parochial church meeting and the chairman of it, and r. 8 specifies the business to be transacted at the annual parochial church meeting. That rule provides: "(1.) The annual church meeting shall receive from the council, and shall be free to discuss—(*a*) a copy or copies of the roll; . . . . (2.) The annual meeting shall elect parochial lay representatives—(*a*) to the diocesan conference, unless the diocesan conference shall otherwise determine; (*b*) to the ruri-decanal conference, when it exists; and (*c*) to the council of the parish, subject to and in accordance with the rules hereinafter contained relating to such elections respectively . . . ."

Now it is apparent from these provisions that the right to take part in the affairs of the Church of England has as its basis the fact that a person has his name on the church electoral roll. The importance of that fact is, I think, recognized by r. 18, which provides by sub-r. 1: "There shall be a right of appeal by any person aggrieved against—(*a*) any enrolment, or refusal of enrolment, on the roll of a parish; (*b*) the removal of any name, or the refusal to remove any name, from the roll of a parish; (*c*) the allowance or disallowance of any vote given or tendered under the foregoing rules; and (*d*) the result of any election held or purporting to be held under the foregoing rules." Sub-r. 2: "Notice of any such appeal shall be given in writing to the rural dean, or if there be no rural dean, to the archdeacon. Such notice shall be given —(*a*) in the case of an appeal against an enrolment or a refusal of enrolment, or in the case of an appeal against the removal of any name or the refusal to remove any name from the roll, not later than seven days after the date of the annual meeting next following such enrolment or refusal of enrolment, or removal or refusal to remove; (*b*) in the case of an appeal against the allowance or disallowance of a vote, within seven days after the date of such allowance or disallowance; and (*c*) in the case of an appeal against the result of an election, within seven days after the result thereof has been announced." Sub-r. 3: "A lay electoral commission shall be constituted in each diocese by the diocesan conference, and any appeal shall be considered and decided by such two or more members of the commission as the commission shall appoint, and their decision shall be final." Sub-r. 4: "For the purpose of such consideration and decision, the members of the commission so appointed shall consider all the relevant circumstances, and shall be entitled to inspect all documents and papers relating to the subject matter of the appeal, and to be furnished with all information respecting the same which they may require." Now those, I think, are all the relevant provisions of the Representation of the Laity Measure, 1929.

Before the year 1932 the plaintiff's name was on the electoral roll of the parish of Haughley, and in the revision, which took place, of that roll by the defendant council in January, 1932, his name was removed from it. In the same month, on January 28, he and other persons whose names had been removed from the electoral roll of the parish gave notice of appeal to the rural dean of Stow, in accordance with the provisions of r. 18 of the Representation of the Laity Measure, 1929. The lay electoral commission thereupon had to decide between the plaintiff and others and the parochial church council of the parish, whether the parochial church council had rightly removed the plaintiff's name from the parochial church roll, and the lay commission who were entrusted to determine the matter were Mr. Singleton Cooper, who, as well as being secretary, was a member of the commission, and two others, and on February 9, 1932, Mr. Singleton Cooper, as secretary of the lay electoral commission, wrote to the secretary of the parochial church council a letter in these terms: "Dear Sir,—I have received a protest from the under-mentioned parishioners of Haughley in regard to the removal of their names from the electoral roll. I have also ascertained that their names are on no other electoral roll. As in consequence of their appeal we have to hold a Commission, I shall be glad to have the reasons of the church council for removing the said names. You are doubtless aware that it is very difficult when names are once on the roll to remove them so long as those to whom the names belong still remain in the parish. I should like your observations as soon as possible." And then there follows a list of ten names including the name of the plaintiff. To that letter the defendant Harper, who was then the secretary of the parochial church council, replied on February 10, 1932: "Dear Sir,—I beg to acknowledge your letter re electoral roll dated February 9, which I received from the Reverend White to-day. I wish to state that your letter shall be brought before the church council at their next meeting, unfortunately for its consideration the church council held its first meeting of the year last night, February 9, otherwise if it had arrived a day sooner it could have been dealt with then. As secretary of the church council last year I should like to state that the electoral roll was revised before a full council and was passed at the annual meeting without one objection. Yours truly (signed) F. Harper, Sec. C.C."

On February 12, Mr. Singleton Cooper replied again to Mr. Harper: "Dear Sir,—In reply to your letter of the 10th inst., I cannot see why there is any reason for you to wait for a meeting of your church council. I want to know the reasons for taking off the names of those electors previously mentioned to you from your electoral roll. You do not need to have another meeting of the church council in order to be able to tell me this. The secretary of the council is the officer responsible for keeping the church roll and also for attending to official correspondence. It is not fair to the people in question to keep them waiting for a considerable time and therefore I must ask you to be good enough to let me have at your early convenience the reasons for the action of your council. At the same time you might let me know whether any notice was sent to the people in question calling their attention to the fact that their names had been removed from the roll. Yours very truly (signed) H. E. Singleton Cooper."

To that letter the following answer was written: " Dear Sir,—In answer to your letter of Feb. 12, I cannot comply with your request until the church parochial council have met. Yours truly (signed) F. Harper, Hon. Sec., Church Council." The next thing that happened was that the lay electoral commission met on February 25, 1932, and met for the purpose of considering the appeal of the ten persons who had given notice of appeal to the rural dean of Stow, and the minute book of the lay electoral commission records that on that date the commission decided that Mr. Singleton Cooper should write to the secretary of the parochial church council to the effect set out in the following letter, which Mr. Singleton Cooper wrote on the same day—namely: " Dear Sir,—With reference to the appeal of some parishioners in Haughley, the commission met at Ipswich this morning and I am instructed to point out to you that the commission is entitled to be furnished with all the information which it may require—rules for representation of the laity (Appeals, Section 18 (4) Diocesan Directory, 1932, page 198). This being so I must request you to summon an emergency meeting of your church council which can be convened by your chairman at not less than three days' notice—Parochial Church Councils (Powers) Measure, rules for procedure, section 7, Diocesan Directory, 1932, page 213. The commission further instructs me to say that unless it hears from you definitely within the course of the next ten days it will have to insist on the names of the parishioners who have appealed being reinstated on the parochial roll. Yours very truly (signed) H. E. Singleton Cooper, Secretary to the Commission."

To that on March 3 a Mr. Lambert, who, I suppose, was a deputy for Mr. Harper, writes: " Dear Sir,—In reply to yours Feb. 25 the council will send their statement in a few days. Yours truly (signed) C. Lambert. For P.C.C. Haughley." Mr. Singleton Cooper answers that on March 4, by saying: " Dear Sir,—I have duly received your letter of March 3, saying that the council will send their statement in a few days in regard to the removal of names of parishioners in Haughley from the electoral roll. You will please note that I shall expect this before very long as you will remember that the commission gave you ten days in which to reply. Yours very truly (signed) H. E. Singleton Cooper, Secretary to the Commission."

There follows that communication a letter from the vicar, the Reverend Walter Grange White, which I do not think it is necessary for me to read, and a letter from the defendant Harper as secretary of the parochial church council in which he says: " Dear Sir,—As secretary of the parochial church council, I am directed to inform you of the following proposition, that was passed by the council last evening, March 7. That the names of [*sic*] the ten persons removed from the electoral roll at the last revision, neither attend worship or support the parish church, and that any further correspondence will not be entered into by the ' Parochial Church Council.' Yours truly (signed) F. Harper, Secretary, P.C.C."

Thereupon, having, as I think they were entitled to suppose, the grounds upon which the parochial church council had removed the names of the appellants from the electoral roll, the lay electoral commission held a meeting on March 23, 1932. Mr. Singleton Cooper and the two other commissioners were present. Mr. Singleton Cooper read the letters, including the letter which had been received from the vicar. Having considered the letters very carefully the commission decided that it could see no reason for removing the appellants' names from the roll.

Mr. Singleton Cooper was instructed to convey this information to the parochial church council that the council must obtain the consent of the persons concerned to the removal of their names or produce conclusive evidence showing that either the names were on the roll of another parish or that they were members of a religious body not in communion with the Church of England. Failing this the council was to reinstate the names at once, and on the same day, March 24, Mr. Singleton Cooper wrote to the secretary of the parochial church council, the defendant Harper: " Dear Sir,—Haughley Electoral Roll. We have considered your letters but we can see no justification for removing the names of the appellants from the electoral roll without having first obtained their consent. If you feel it desirable that these names should be removed from the roll the best course of action is to see the people concerned and get their consent to the removal of their names or else you must produce conclusive evidence that they are members of a religious body not in communion with the Church of England. If you are not prepared to do this please reinstate all the names at once and let me have a certificate to the effect that this has been done. Yours faithfully (signed) H. Singleton Cooper, Secretary to the Commission."

[His Lordship then read letters indicating that, notwithstanding the intervention of the Bishop of the diocese, the council declined to give any further reasons in writing for having removed the plaintiff's name from the roll and persisted in their refusal to reinstate the name on the roll, and that the Bishop ultimately appointed the Rural Dean of Stow to put into effect the decision of the Commission. His Lordship then continued :]

Accordingly in pursuance of that authority the Rural Dean of Stow on September 20, 1932, posted up on the door of the church of the parish of Haughley a supplementary roll containing the names of those who had appealed from the act of the church council, including the name of the plaintiff. And the Rural Dean having put that up some one unknown, either on that day or the next, took it down. The name of the plaintiff was not restored to the electoral roll at the revision

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which took place in January, 1933. The plaintiff attended the parochial meeting in January or February, 1933, and he was told that he had no right to be there. He waited until the year 1934, when the next parochial church meeting of the parish of Haughley was held. His name was not then on the parochial church roll.

He went to the meeting for the purpose of exercising the right of taking part in the meeting, and he was met by a steward or two stewards and a police constable and was informed that he was not on the roll, and no doubt for the presence of the police constable the vicar was responsible.

Those, I think, are all the relevant facts and the question is what are the legal rights of the parties.

Hon. S. O. Henn Collins K.C. and *W. T. Elverston* for the plaintiff. The lay electoral commission, being the appellate tribunal appointed under the provisions of the Representation of the Laity Measure, 1929, have decided that the plaintiff's name must be restored to the roll. The parochial church council are bound by the decision of that tribunal and cannot raise in this Court the question whether the plaintiff has the right to be on the roll.

W. N. Stable K.C. and *Michael Hoare* for the defendants. This application is improperly made. The true remedy of the plaintiff was to ask for a writ of mandamus in the King's Bench Division, instructing the lay electoral commission to hear the appeal. No appeal has been considered or decided. The commission has not satisfied its statutory obligations, because it has completely disregarded the elementary rules of natural justice. The commission never gave the defendants an opportunity of stating their case orally.

[They referred to *Cooper* v. *The Wandsworth Board of Works* (1); *Maclean* v. *The Workers' Union* (2); and *Hopkins* v. *Smethwick Local Board of Health.* (3)]

Henn Collins K.C. in reply.

BENNETT J. [after stating the facts, continued:] The first

(1) (1863) 14 C. B. (N. S.) 180, 189.
(2) [1929] 1 Ch. 602.
(3) (1890) 24 Q. B. D. 712.

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question which was debated was whether the lay electoral commission had come to a decision on the appeal of the plaintiff from the act of the parochial church council. Counsel for the defendants contended that they had not, and that until they decided the appeal it must be taken that the action of the parochial church council was right and that the plaintiff was not entitled to the relief that he claims. Having considered the correspondence and the action of the parties and also the pleadings, because the pleadings may not be without importance on the point which counsel for the defendants put in the forefront of his defence, I think there is no doubt whatever that on March 23, 1932, the lay electoral commission decided that the appeal of the plaintiff and the other members of the parish who were associated with him ought to be allowed. Nobody had any doubt about that at the time, and but for the subtle argument of counsel for the defendants at the bar I do not think anybody would have had any doubt about it now. I decide that the lay electoral commission at the meeting on March 23 decided that the plaintiff's name and the names of those who were associated with him were to be restored to the electoral roll of the parish of Haughley.

That point having been decided against counsel for the defendants, the next point he took was that the lay electoral commission acted contrary to natural justice. The foundation of that contention was that the lay electoral commission had not heard the parochial church council or the defendant the vicar or the secretary or some members of the parochial church council and that it was contrary to natural justice to come to a decision without hearing argument. The lay electoral commission is a statutory body, a body of laymen, and the powers of a court of law to interfere with the decisions of a body of that kind are distinctly limited, and, as Maugham J. decided in *Maclean* v. *The Workers' Union* (1), the Court has no jurisdiction to vary or set aside the decision of such a tribunal if in giving the decision the tribunal has acted honestly.

I propose to follow that decision. There is no question

(1) [1929] 1 Ch. 602.

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but that the commission acted in good faith. It gave to the defendants the parochial church council an opportunity of stating the grounds upon which it removed the plaintiff's name from the electoral roll. The parochial church council stated in writing the grounds upon which it had removed the plaintiff's name from the church roll. I can see nothing contrary to natural justice in the way in which the lay electoral commission decided the appeal against the parochial church council. That disposes of the ground on which the defendants tried to attack the decision of the lay electoral commission. Accordingly the action in my judgment succeeds and the plaintiff is entitled to a declaration that he is entitled to have his name reinstated on the electoral roll of the parish of Haughley. He is entitled to an order directing the defendant council and Mr. Nunn as the secretary of the defendant council to reinstate his name on the electoral roll, and is entitled to an injunction to restrain the defendants and the parochial church council and the defendant the Reverend Walter Grange White from interfering in any way with the plaintiff attending and voting at the parochial church meeting of the parish of Haughley or exercising any other right vested in him as a person whose name is entered on the electoral roll. The costs of the plaintiff must be paid by the parochial church council and the Reverend Walter Grange White.

Solicitors: *Whites & Co., for Greene & Greene, Bury St. Edmunds; Owen White & Catlin.*

J. L. D.

C. A.

1934
FARWELL J.
Nov. 6, 7.

C. A.

1935
Feb. 8, 11.

In re LOVEGROVE.

Ex parte G. LOVEGROVE and CO. (SALES), LIMITED.

In re LOVEGROVE.

Ex parte THE TRUSTEES.

Bankruptcy—Sales agreement between manufacturer and company—Goods previously ordered by customers—Sale at discount to company for cash—Goods invoiced to customers in name of company—Bill of Sale—Assignment of future book debts—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 3, 4*—Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 4, 8*—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 43.

Being short of liquid capital, the debtor, who was a manufacturer of furniture, approached A. for assistance. A. agreed to help him and for this purpose a company was incorporated on September 1, 1933, with a capital of 100 shares of 1*l.* each, of which A. held ninety-eight, his clerk one, and the debtor one. On the same date the debtor entered into an agreement with the company by which the company agreed to buy for cash goods manufactured by him up to a total amount of 7000*l.*, the price to be 10 per cent. less than the prices that any of certain specified customers had agreed to pay for them, and the goods to be invoiced to the customers in the name of the company. The agreement also provided that the debtor should not sell goods to any person other than the company, that he should repay to the company any part of the price of goods so purchased which the customer failed to pay, and that the company should not make a profit of more than 2500*l.* in any one year. Notices were issued to customers that for the future sales would be effected through the company. On February 5, 1934, a receiving order was made against the debtor, and on February 19 he was adjudicated a bankrupt. The question arose whether the agreement was void as against the trustees in bankruptcy so that the sums remaining due from customers at the beginning of the bankruptcy formed part of the debtor's estate:—

Held, by Farwell J, that the agreement was void as against the trustees as being an unregistered bill of sale.

Held, by the Court of Appeal (reversing Farwell J.'s decision), that the agreement was not void either as an unregistered bill of sale or as an assignment of future book debts within s. 43 of the Bankruptcy Act, 1914.

MOTIONS.

The facts are fully set forth in the judgment of Farwell J.

Tindale Davis and *V. R. Aronson* for the appellant.

Croom-Johnson K.C. and *W. N. Stable* for the respondents.

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1934
LOVEGROVE, *In re.*

FARWELL J. This matter comes before the Court in the form of two motions, one by a company known as G. Lovegrove & Co. (Sales), Ld., against the trustees in bankruptcy of Mr. George Lovegrove, and the other a motion by the trustees of the bankrupt against a Mr. Alfred Applestone and the sales company. I propose hereafter in my judgment to refer to G. Lovegrove & Co. (Sales), Ld., as "the sales company."

I think the first of the motions in point of time was the motion on behalf of the sales company. That matter came before Luxmoore J., and on April 23, 1934, it was adjourned by order of his Lordship to enable the respondents to set down a cross motion; certain directions were then given with regard to evidence and matters of that kind, and that motion, that is the original motion, accordingly stood over. Subsequently the trustees gave their notice of motion, and to that notice of motion were made respondents not only the sales company, but also Mr. Applestone. Objection was taken at the hearing of this motion to that procedure on the ground that there was no leave to add a party—that the only right was to give a cross notice of motion against the sales company. I did not accept that objection as a valid one; the matter has accordingly proceeded, and the two motions have been dealt with together.

The question I have to determine is one of some difficulty.

The notice of motion by the sales company against the trustees asked for: "A declaration that under and by virtue of an agreement in writing made on the 1st, September 1933 between the bankrupt and the applicants the applicants are entitled as against the respondents to all the cheques and cash and any other payments either forwarded or made to and/or received by the bankrupt or on his behalf prior to the receiving order herein or by the respondents subsequent to the adjudication by or from those customers to whom goods chattels had been sold in pursuance of the terms of the said agreement"; then for an account and for an order upon the trustees to hand over books, documents and other papers held by them.

The motion by the trustees against the sales company and Mr. Applestone asked for the relief which is set out in their points of claim : points of claim and points of defence having been delivered in pursuance of the order made by Luxmoore J. In effect it comes to this, that the trustees in bankruptcy claim that the agreement to which I shall have to refer in detail of September 1, 1933, is void under the Bills of Sale Acts and that accordingly the moneys in question which the sales company claim to be their moneys are payable to the trustees in bankruptcy.

The facts which are relevant to those considerations are these : The bankrupt, Mr. Lovegrove, was carrying on business prior to his bankruptcy as a manufacturer and wholesale dealer in furniture. He is apparently a person with considerable ability in his own business, because he started quite a small business with a capital of 1000*l.* in or near London ; later he transferred his business to High Wycombe, and in 1933 the business had grown to very considerable dimensions ; the turnover in 1933 was something in the neighbourhood of 100,000*l.* The business was a highly successful one. One of the witnesses in the witness-box said that Mr. Lovegrove's business was one of the best businesses of its kind in the country, a high class business ; and quite obviously—I have seen Mr. Lovegrove in the witness box—he was a person of integrity and ability in his own business. But he was hampered, and sadly hampered, in carrying on his business by an insufficiency of liquid assets. The business was making, apparently, quite a substantial profit, but the actual cash necessary for carrying on that business was insufficient, and there is no doubt that in 1933 Mr. Lovegrove was being very much pressed by the want of further capital ; further capital in the sense of cash upon which he could draw for his current expenses. In July, 1933, he was being pressed by one substantial creditor, and his position was an unfortunate and somewhat embarrassing one from his point of view, because he had, as I have said, a very high class and substantial business, and yet for want of ready money he found himself in a serious difficulty. In those circumstances he considered how moneys could be obtained and he was brought into touch with a Mr. Woolf, who was a solicitor carrying on practice under the name of Alec Woolf & Co. I think Mr. Woolf and Mr. Lovegrove had had some dealings at an earlier date in 1933, but for all material purposes Mr. Lovegrove met Mr. Woolf in July of 1933 for the first time so far as this transaction is concerned. Mr. Lovegrove told Mr. Woolf about his financial position ; he explained to him his difficulties and consulted with him as to means whereby those difficulties could be relieved. The suggestion was made that the business should be turned into a limited company, and that then by a debenture or debentures the necessary money could be secured. Mr. Lovegrove did not find that suggestion acceptable. He seems to have thought that if the business was turned into a limited company and money was raised on debenture it might seriously affect the credit which he enjoyed with the persons from whom he purchased material, and for that reason he was not willing to adopt that suggestion. Thereupon Mr. Woolf said that he had a client who might be able to assist in the matter, and ultimately Mr. Lovegrove was introduced to Mr. Applestone at Mr. Woolf's office. Mr. Applestone seems to be a gentleman who has some connection with and interest in the furniture trade and seems at some time or other to have been able to be of service to other furniture companies. The parties met and the matter was discussed in July and August, and ultimately the negotiations resulted in the transaction which is embodied in two documents, to which I will refer in a moment. I should say this, although it does not seem to be very material, that before those documents were finally agreed and executed, Mr. Lovegrove seems to have had some qualms about the matter, because he apparently was anxious to put an end to the negotiations at one time; but having reconsidered it, the matter went on, and on September 1 the arrangement was carried into effect.

It is important to remember when one considers what the transactions were which were effected on September 1, 1933, what the position of Mr. Lovegrove was. He was, as I have said, the proprietor of a fine business; he had a large number of customers all, or most of whom, were high class firms and business people whose credit was excellent, and who were for the most part in a position to pay and did pay their just debts. The course of dealing seems to have been that the money which was due to the business was paid at the end of three months, so that there was a period of three months during which Mr. Lovegrove was out of the money which he would ultimately get as the price of the goods which he had sold, and that, no doubt, was one of the causes of his financial embarrassment. Early in September, 1933, he wanted money quickly. It is also not unimportant to remember that Mr. Lovegrove had refused to consider a scheme which involved a debenture because he was fearful of his credit, and it is therefore natural to suppose that he would have been extremely shy of any transaction which involved a bill of sale which was on the face of it a bill of sale; but that he did want money and that he was prepared to give security for that money if he could do so without impairing his credit is, I think, beyond all question.

The first of the two documents which was executed on September 1 was a mortgage of that date made between the bankrupt, Mr. Lovegrove, and the sales company; but before I proceed to consider these documents I must say a word about the sales company. For some reason which I confess I find it a little difficult to appreciate if the transaction was that which the respondent, Mr. Applestone, and the company ask me to say it was, the incorporation of this company was desirable, and accordingly on September 1, the day on which these transactions were carried out, G. Lovegrove & Co. (Sales), Ld., came into being for the first time. Alec Woolf & Co. were solicitors to the company. It was a private company with a share capital of 100*l.* The signatories to the memorandum and articles of association were Mr. Lovegrove and a lady called Miss Patricia Pheby, who was a clerk in the employment of Mr. Applestone; and one of the objects for which the company was established was "To enter into and carry into effect (with or without modification) an agreement which has already been prepared and is expressed to be made between George Lovegrove . . . . of the one part and the company of the other part"—that was one of the two agreements to which I am going to refer in a moment. The articles of association incorporate Table "A" except in so far as they are not inconsistent with the special articles; and they provide that the directors "shall not be less than one nor more than ten and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association." Finally article 18 provides: "A written resolution signed by every member of the board shall be effective as a resolution of the board at a meeting duly convened and constituted."

To deal with the company at once, what happened was this. As soon as the company was incorporated the signatories appointed themselves to be directors of the company, and Mr. Applestone, acted as secretary to the company; he was the only person who had the right to draw cheques on the company's account, and the whole of the share capital of 100*l.* was found by Mr. Applestone, ninety-eight of the shares being registered in his name, one share in the name of Mr. Lovegrove, and one share in the name of Miss Pheby. In fact the share capital was wholly Mr. Applestone's, and there is no doubt whatever on the whole of the evidence which I have heard and on the documents before me that although in law Mr. Applestone and the company were two separate entities, in truth and in fact the sales company was nothing else than a substitution for Mr. Applestone himself. It is quite plain that Mr. Applestone was the only person who had any interest in the company; he was the person who found the money, and the whole object of the incorporation of this company was for the purpose of not letting it be known to persons who dealt with Mr. Lovegrove that Mr. Applestone was the person with whom the various transactions were being carried out—and therefore this company was formed, a company which depended for its usefulness and its existence upon Mr. Applestone, who was the person behind the scenes.

That company having been formed, the two documents which were executed on September 1 were made between the bankrupt and the sales company. The first of those two documents was a mortgage to secure repayment of a sum of 5600*l.* It recites that Mr. Lovegrove, who is described as the manufacturer and carries on business as a furniture manufacturer at High Wycombe, " and in connection with such business the several persons whose names are set out in the first column of the schedule hereto have become and are now indebted to him in the several sums set opposite to their respective names in the second column of the said schedule. And whereas the manufacturer has requested the company to advance to him the sum of 5094*l.* which the company has agreed to do upon having the same secured in manner hereinafter appearing. Now this deed witnesseth as follows :—(1.) In pursuance of the said agreement and in consideration of the sum of 5094*l.* now paid by the company to the manufacturer (who hereby acknowledges the receipt thereof) the manufacturer hereby covenants with the company that the manufacturer will on the 1st day of December 1933 pay to the company the said sum of 5094*l.* together with the sum of 566*l.* 6*s.* 3*d.* by way of interest thereon making a total of 5660*l.* 6*s.* 3*d.*" Then there is provision for payment of interest at a corresponding rate. Then security for repayment of the sum is to be found in clause 2 : " For the consideration aforesaid the manufacturer as beneficial owner hereby assigns to the company all the several debts or sums of money specified in the second column of the schedule hereto due and owing to the manufacturer as aforesaid from the several persons " whose names are set out in the schedule. Then in the schedule there is a long list of names with the amounts of the debts to Mr. Lovegrove ; those, of course, are in respect of debts actually accrued and total 5660*l.* 6*s.* 3*d.* The mortgage contains the usual provision in the case of a mortgage of existing book debts enabling the company to collect the amount of those debts.

Now there is nothing to which objection can be taken so far as that transaction standing alone is concerned except that it may be said that the interest which Mr. Applestone in the form of the sales company was getting for the money was very considerable. When one takes into consideration the fact that these debtors were, as is admitted, responsible people, and that the bulk of the money, if not the whole of it, would be paid within three months, the benefit which Mr. Applestone and the sales company were getting out of the transaction was very considerable. However, apart from that there is nothing in that arrangement which is objectionable in law, and if it stood alone no difficulty would have arisen. The 5094*l.* which is there mentioned as the amount of the loan was found by Mr. Applestone. The sales company were in no position to find the 5094*l.*; the company had no money other than the 100*l.* which in fact was deducted from the 5094*l.*, so that there was no money which was available for lending to Mr. Lovegrove or to any one else in the coffers of the company; but as the coffers of the company for this purpose were the same as the pockets of Mr. Applestone, there was no difficulty and the money was forthcoming from Mr. Applestone's pocket, and undoubtedly was paid over to Mr. Lovegrove.

Now no one could suggest, and no one has ventured to suggest, that that transaction was anything more than a loan transaction. Mr. Lovegrove wanted money. Mr. Applestone was ready to find the money. Mr. Applestone quite properly and naturally wanted security. The security which he was given was the assignment of existing book debts, a perfectly proper transaction, but in its essence a loan transaction and nothing else. As I say, if that stood alone no difficulty would have arisen. But on that fatal day there was also executed another document. That document also was made between Mr. Lovegrove and the sales company, but it is a document in a most unusual form, and I am afraid it will be necessary for me to refer to a great deal of it, because it is all interesting and important from the point of view which I am considering. It recites that the manufacturer is carrying on business. It recites that: "The company has been incorporated with the principal object of entering into this agreement and to have the exclusive rights of purchasing the furniture manufactured by the manufacturer upon the terms and subject to the conditions hereinafter mentioned." Clause 1 provides: "For purposes of this agreement the phrase 'customers on the list' shall mean those existing customers of the manufacturer and those future customers of the company whose names shall from time to time be set forth in a list to be prepared and agreed between the parties hereto provided that (*a*) the names of any customers may from time to time be removed from the said list by agreement between the parties hereto and (*b*) if any such customer shall prove to be an unsatisfactory customer of the company and the company shall give notice of this fact to the manufacturer his name as from the date of such notice shall deem to have been removed from the said list." Clause 2 provides: "The company shall purchase from the manufacturer and the manufacturer shall sell to the company from time to time all such goods manufactured by the manufacturer as the company may require for its business and the following provisions shall have effect with regard to the price and delivery thereof and payment therefor:—(i) The price to be paid for any goods purchased from the company by customers on the list shall be the price as hereinafter defined less ten per cent. thereof and for any other goods purchased from the company the price as hereinafter defined. (ii) For purposes of this agreement 'the price' shall mean the price at which goods are invoiced to any customer. (iii) All goods purchased by the company from the manufacturer shall be delivered at the responsibility and expense of the manufacturer at such place as the company shall at the time of the purchase thereof specify and the manufacturer shall be liable to indemnify the company in respect of any delays in delivery or breakages in transit. (iv) Payments for any goods so purchased shall be in the case of goods purchased from the company by customers on the list as soon as conveniently possible upon the company agreeing to sell the same and in the case of customers other than customers on the list as and when the company shall receive from them the final instalment of the purchase price therefor. And the manufacturer hereby warrants that any goods purchased hereunder by the company shall be of merchantable quality and shall be fit for the purpose for which they shall from time to time have been purchased. Provided that if and so long as the total of the purchase prices owing from time to time to the company by customers on the list shall exceed 5000*l.* all sales by the company to customers on the list in excess of 5000*l.* shall at the option of the company be deemed to be sales to customers other than customers on the list unless the manufacturer shall on or before the 30th September 1933, have given notice in writing to the company that he desires the said limit of 5000*l.* to be increased to an amount up to but not exceeding 7000*l.* in which case this clause shall be altered accordingly and such increased amount shall be substituted therein in place of the said sum of 5000*l.*" Then there is a provision: "(3.) If it shall become necessary for the company to compromise any claim against a customer in respect of the purchase price of any goods sold to him or if a customer refuse for any reason or is unable to pay the whole or any part of the purchase price of any goods purchased by him the manufacturer shall forthwith pay to the company the difference between the sum actually received from such customer and the price at which the goods were sold to him. (4.) In the event of the rate of discount from time to time taken by any of the customers on the list exceeding 2½ per cent. for three months or 3¾ per cent. for 60 days the manufacturer shall forthwith pay to the company the sum represented by any such excess. (5.) The manufacturer shall at his own expense provide all necessary office accommodation and clerical and accountancy services and necessary services from servants employees and agents required for the purpose of carrying on the work of the company and giving effect to this agreement and shall pay all the other expenses incurred by the company in the proper carrying on of the business of a dealer in furniture. The manufacturer shall indemnify the company against all liability in respect of any acts or omissions of any servants employees or agents whether provided by the manufacturer or employed by the company.

The manufacturer shall actively engage in the procuring of satisfactory customers for the company and of orders from customers on the list and shall if required by the company furnish it from time to time with information with regard to his existing customers. The manufacturer shall procure that the total of the purchase prices of goods purchased from the company by customers on the list shall not at any time be less than 5000*l.* or such increased amount up to 7000*l.* if the manufacturer shall have given notice under clause 2 (iv) hereof increasing the said sum of 5000*l.* and if he shall fail to do so he shall pay to the company 3 per cent. of the difference from time to time between the said total and the sum of 5000*l.* or such increased amount as hereinbefore referred to such percentage to be calculated up to and paid on the first day of every month." Then there is a provision by which the company is entitled " to deduct from any sums due from it to the manufacturer any sums due from the manufacturer under clauses 3, 4 and 5 hereof and the manufacturer shall indemnify the company against any claims made in respect of any goods purchased from the manufacturer and sold by the company." Clause 7 provides: " The manufacturer hereby covenants that he will not during the existence of this agreement sell any furniture manufactured by him otherwise than to the company." Then there are provisions to keep proper books, and clause 11 provides: " The expenses relating to the negotiations of this agreement the completion thereof the formation of the company and all other incidental matters in regard thereto shall be paid by the manufacturer." There is then a clause providing for determination of the agreement, and finally there is this clause which I must read: " If the company shall during the twelve months following the date of this agreement make a net profit under this agreement in excess of 2500*l.* then the company shall pay to the manufacturer a sum equal to the amount of any such excess. The net profits of the company under this clause shall be certified by the accountants to the company whose decision shall be final. An account shall be taken each quarter after the date hereof and such net profit shall be then ascertained and in the event of same being in excess of 750*l.* for any one quarter then such excess shall thereupon be paid by the company to the manufacturer," and then any necessary adjustments shall be made.

That is the second document of September 1, 1933, a document which it is said on behalf of Mr. Applestone represents nothing more than an agreement by which the sales company were to purchase and Mr. Lovegrove was to sell his goods to Mr. Applestone. It is very difficult for me to appreciate if that was the intention of the parties, and if that is what this document means, why many of these stipulations and conditions should have been inserted therein. Many of them are wholly inconsistent, in my judgment, with an ordinary sale and purchase of goods transaction. It is a document which, in my view, on the mere perusal of it offers at once cogent reasons for thinking that it cannot be what it was intended to be, nor was the transaction intended to be one of simple sale and purchase of goods; but I will come back to that in a moment, because before I deal with that further I should say this. There was yet another document signed on September 1, and that was a document in the form of a letter signed by Mr. Lovegrove which was appended to the mortgage and was in these terms: " Dear Sirs, I confirm as agreed with Mr. Woolf this afternoon that the 5094*l.* paid by G. Lovegrove & Co. (Sales) Ld. to me under the mortgage deed of even date is to be treated for all purposes as though it were the amount paid by the company to me as the purchase price of goods sold by the company to customers on the list in accordance with the terms of my agreement with the company of this date, and further the profit made or to be made by the company on the mortgage referred to shall be brought into account in calculating the amount of net profit dealt with in clause 13 of the sales agreement."

What happened after September 1 was this. The 5094*l.* was paid, as I have said, by Mr. Applestone to Mr. Lovegrove. Business went on precisely as before. Mr. Lovegrove employed his own agents to procure goods for him; he proceeded to manufacture goods and to sell goods and in every way the

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business was carried on, so far as the business itself was concerned, as it had been carried on before. All the goods which were manufactured by Mr. Lovegrove from time to time which were in his showrooms remained in his custody and power, and there was no transfer of any goods to any one else by the company. Mr. Lovegrove continued to manufacture and to sell his goods to his various customers from time to time, and so far as that was concerned there was no difference. The fact of the sales company's existence was called to the notice of the customers of Mr. Lovegrove by means of two circulars dated September 1, one sent to the persons who were existing debtors, and the other to ordinary customers. Those circulars pointed out that: "A new company has been formed under the name G. Lovegrove & Co. (Sales) Ld., and in future all sales will be made through this company and all payments should be made to it. By forming an entirely sales unit we hope to be able to improve upon our service to you," and then there is in the case of the circular addressed to existing debtors a clause asking that the debts should be paid to the company and not to Mr. Lovegrove—and a similar sort of direction is given in the other circular. So that the customers were notified of the existence of the company and that it was the company from whom they were to buy the goods and to whom they were to pay the price. So far as the sales company's own employees were concerned, it had none; they were provided by Mr. Lovegrove; certain books were kept, but there was no separate office and no separate staff of any sort or kind. The company did exist, and that is all one can say about it; it was alive, but it had really no active function except to disguise Mr. Applestone, who was the company in fact.

After September 1 the way in which the business was transacted as between the company and Mr. Lovegrove was this: Goods were ordered, and Mr. Lovegrove sent to the company from time to time lists showing the goods which had been ordered and the price therefor. Every time an order was given there was not a notification to the sales company, but at the end of a period when a considerable number of orders had accumulated a list would be sent in to the sales company showing the names of the customers and the prices at which the goods were sold to the customers, and thereupon the moneys would be advanced nominally by the company, in fact by Mr. Applestone, for the amount of the sale price of the goods less 10 per cent., but with this provision, that there were two accounts kept, an " A " account and a " B " account. So far as the " A " account was concerned, that was moneys which were provided by Mr. Applestone and which he was to get back. So far as the " B " account was concerned, that being money in excess of the amount which, as provided by clause 13 of this agreement, was put on the " B " list, that money belonged to Mr. Lovegrove. Within a comparatively short time after September 1, certainly I think before the bankruptcy, moneys were paid into the sales company more than sufficient to discharge the whole of the indebtedness upon the mortgage of September 1; but, of course, further moneys were found by Mr. Applestone from time to time as further sales took place. Notice to increase the amount to 7000*l.* had been given.

Matters went on in that way until the beginning of the next year, when Mr. Lovegrove found his position was so embarrassing that he could not carry on any longer. He had a meeting of his creditors, and on January 13 of this year a petition was presented; on February 5 the receiving order was made, and on February 19 he was adjudicated bankrupt. Two trustees were appointed, and they are the two applicants on the second motion to-day. Considerable sums of money were outstanding due to Mr. Lovegrove or the sales company at the time of the bankruptcy and under a very sensible arrangement made between the parties those sums have been collected and a very considerable proportion of them is now standing to the credit of a joint account waiting for the determination of these motions. There is a further sum which I think the sales company have collected, or some of which at any rate they still have in hand, and which if they are not entitled to retain it must be handed over to the trustees. The trustees themselves have also collected a further small sum, and it is as to the destination of those various sums that these motions have been moved.

The matter is one of some complication, because the documents, at any rate the second document of September 1, are not at all easy to understand. I should have said this. There is no evidence before me, and in fact the inference which I draw is the other way, to show that the goods which were ordered from Mr. Lovegrove or from the sales company at the time when the sales company were notified by Mr. Lovegrove of the orders which he had received from the customers had been delivered to the customers. The course of dealing as I understand it was that as soon as Mr. Lovegrove obtained an order for furniture from a customer a copy of the invoice was sent to the sales company, and when in due course the furniture was delivered subsequently, payment was made to the sales company.

The question I now have to determine is whether the second document of September 1 is a valid and subsisting document upon which the sales company and Mr. Applestone are entitled to rely, or whether, as the trustees say, it is void because it is a bill of sale and is not in the form required by the Bills of Sale Act (1878) Amendment Act, 1882, and is not registered. I think there is no doubt about this, that whether a document is or is not a bill of sale is a matter which has to be determined after considering the terms of it and the whole of the circumstances. It may be a bill of sale notwithstanding that the form of the document is intended to suggest something else; and if this is a bill of sale it is admittedly a document upon which no reliance can be placed, because it is not in the form prescribed, nor has it been registered. Now the position at the time when the deed was executed was that Mr. Lovegrove wanted money with which to carry on his business. He was getting some money under the mortgage of September 1, but he would shortly require further money, and the question was how was he to obtain it.

In those circumstances I have no doubt whatever that the arrangement between Mr. Applestone and Mr. Lovegrove was intended to be as between themselves a loan transaction.

Mr. Applestone was lending money to Mr. Lovegrove, and Mr. Applestone was to have security for those loans—he could without difficulty get security in the case of those debts which were already existing at the date of the mortgage. There were no doubt, from his point of view, objections to taking a charge upon future book debts in the possible event of the subsequent bankruptcy of Mr. Lovegrove; and this device was adopted in order to enable loans to be made to Mr. Lovegrove by Mr. Applestone, security being given to Mr. Applestone by a charge on the chattels of Mr. Lovegrove, chattels remaining in the possession of Mr. Lovegrove until they actually passed into the hands of the ultimate purchaser. That I am satisfied was what the parties intended by this transaction. When I say this was the device adopted I am not saying it in any sinister way. If persons carry out a transaction of this sort which successfully avoids the Bills of Sale Act, there is nothing in law to prevent them doing so. But if they adopt a device which is intended to avoid the provisions of the Bills of Sale Act they will suffer if their device is not successful. In this case it appears to me that the device is unsuccessful, and I am quite unable to accept the view that this second document of September 1 represents a sale and purchase agreement between the company and Mr. Lovegrove and nothing more. I find it impossible to take that view having regard to the many stipulations contained in the document, which appear to me to be inconsistent with such a transaction. Then it is said that in any event this document does not come within the definition of a bill of sale. It is said that a bill of sale must be a document given with respect to the transfer of chattels in cases where possession is not intended to be given. It is said here that there is no transfer of chattels because the goods go direct from Mr. Lovegrove to the ultimate purchaser, and there is no question of their getting into the hands of the sales company. In my view that is a fallacy. As soon as an order was given to Mr. Lovegrove by a customer either for goods which were then made and were to be delivered or for goods which Mr. Lovegrove was to manufacture for the customer—

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as soon as the order was given in the first case, or as soon as the order was given and the goods were made in the second case—as from that date until they were actually delivered to the ultimate customer the company was in a position to look to those goods as security for the money which it was advancing. In my judgment that is precisely what the Bills of Sale Act does not permit. Here there was a security upon chattels, which were to remain in the possession of Mr. Lovegrove but which were the property, at any rate for a time, of the sales company, who could have obtained possession of them under this document.

In these circumstances I am satisfied that the trustees in bankruptcy are justified in their claim that this document is and can only take effect as a bill of sale, that it is void because it is not in the prescribed form, and is not registered, and that in those circumstances the money which is now being held until this case has been decided is the money of the trustees for the purpose of the bankruptcy. It is said that the result of such an order will be that Mr. Lovegrove will be paid twice. In my view that is not so. The first moneys which came to the sales company after September 1 must be treated as having been in payment of the mortgage of September 1, and the subsequent moneys were moneys which were advanced from time to time by Mr. Applestone or the company to Mr. Lovegrove. The fact that there was a sort of perpetual cycle of money coming in and going out does not affect the position in law that the mortgage must be treated as having been discharged by the first money which came into the account and that the subsequent moneys are moneys which were advanced under the second document of September 1, to which in the view which I take of the matter neither Mr. Applestone nor the company can make any claim as secured creditors. I say nothing about their rights to prove in the bankruptcy as unsecured creditors; that is a matter with which I am not dealing.

P. J. B.

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Mr. Applestone and the sales company appealed, and there was a cross-appeal by the trustees. The appeal was heard on February 8 and 11, 1935.

On the appeal two questions were raised: (1.) whether the agreement dated September 1, 1933, for the sale of goods to the sales company was void against the trustees as an unregistered bill of sale; and (2.) whether the agreement was void against the trustees as a mortgage of future book debts under the Bankruptcy Act, 1914, s. 43. (1)

Tindale Davis and *V. R. Aronson* for the appellants.

Croom-Johnson K.C. and *W. N. Stable* for the respondents.

LORD HANWORTH M.R. The point to be considered is whether or not a deed of September 1, 1933, is valid and effective as against the trustees in bankruptcy of Mr. George Lovegrove, who is now a bankrupt. The appeal is put down in relation to two motions, the one anticipating the other, the first being a motion by G. Lovegrove & Co. (Sales), Ld., for a declaration that the deed in question is valid. In the other, a separate motion, the useful but exceptional course was taken of ordering that there should be pleadings, and thus we have in those motions points of claim and points of defence telling the story and raising the question which has to be decided.

For the purpose of this judgment the matter can be put quite shortly by recounting a very few dates. On January 27, 1934, an act of bankruptcy was committed by Mr. Lovegrove, who gave notice of the suspension of his ability to pay his debts. A petition was presented on January 30, and on

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(1) Bankruptcy Act, 1914, s. 43, enacts : " (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class thereof, and is subsequently adjudicated bankrupt, the assignment shall be void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy, unless the assignment has been registered as if the assignment were a bill of sale given otherwise than by way of security for the payment of a sum of money, and the provisions of the Bills of Sale Act, 1878, with respect to the registration of bills of sale shall apply accordingly. . . . .

(2) For the purposes of this section, 'assignment' includes assignment by way of security and other charges on book debts."

February 5 a receiving order was made against him, and subsequently he was adjudicated a bankrupt.

On September 1, 1933, certain agreements were entered into. Mr. Lovegrove was engaged in business in High Wycombe as a manufacturer of furniture, and his business was a high class one. It is just and fair that I should recall the words used in respect of him by the learned judge, who said: "The bankrupt was carrying on business prior to his bankruptcy as a manufacturer and wholesale dealer in furniture. He is apparently a person with considerable ability in his own business, because he started quite a small business with a capital of 1000*l.* in or near London; later he transferred his business to High Wycombe, and in 1933 the business had grown to very considerable dimensions; the turnover in 1933 was somewhere in the neighbourhood of 100,000*l.* The business was a highly successful one. One of the witnesses in the witness-box said Mr. Lovegrove's business was one of the best businesses of its kind in the country, a high class business; and quite obviously —I have seen Mr. Lovegrove in the witness-box—he was a person of integrity and ability in his own business."

At a time previous to September 1, 1933, Mr. Lovegrove was being pressed by one substantial creditor and he was in difficulties how to meet the situation which had occurred. He went to Mr. Applestone, a friend who was prepared to assist him on business lines, and Mr. Applestone did so by entering into the agreement which is now in question—namely, the second agreement of September 1, 1933. What was done was this: A company called G. Lovegrove & Co. (Sales), Ld., was formed and registered on the same day. It was a company with a very small capital, and it was no doubt a device to have a separate entity apart from the business of G. Lovegrove as carried on at High Wycombe. The agreement entered into must be carefully examined. It is an agreement made between Mr. Lovegrove, who is called "the manufacturer," and G. Lovegrove & Co. (Sales), Ld. The sales company had been formed by Mr. Applestone, who held substantially all the shares, so that the sales company represents Mr. Applestone. The agreement entered into was that Mr. Lovegrove was to

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continue to manufacture the furniture and to go on with his business in the ordinary way. He covenanted that he would not sell any furniture manufactured by him otherwise than to the sales company, nor was he to cease manufacturing furniture as an independent person. The company covenanted that it would not, during the existence of the agreement, purchase any article of furniture except from the manufacturer. We have thus got the nexus between the manufacturer and the company under this agreement, which was to last for twelve months certain and thereafter to continue unless determined by three months' notice in writing given at any time after May 1, 1934.

The procedure after the manufacturer had made the furniture and had sold it to the sales company was as follows. By clause 2 of the agreement: "The company shall purchase from the manufacturer and the manufacturer shall sell to the company from time to time all such goods manufactured by the manufacturer as the company may require for its business." Those words, "as the company may require for its business," seem to leave an act of volition on the part of the sales company to say whether it will take every piece of furniture manufactured by the manufacturer. Those words could easily have been left out, and if they had been left out there could be no question but that every piece of furniture manufactured would be sold to and taken over by the sales company; but when those words are added there is a limit beyond which the company is not bound to go. Lists were to be made of the customers of Mr. Lovegrove, and the business was to go on, with the result that there would be, in the ordinary course, a demand made by the customers for the furniture which they required, and the usual course of Mr. Lovegrove's business would be followed.

But Mr. Lovegrove was in the position that he could not wait for any considerable time for payment from these customers, and so this system was established under the agreement: when the customer asked for goods, or when Mr. Lovegrove found a customer for particular goods, there was to be a sale which was to be carried out by an invoice, which was undoubtedly

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an invoice bearing the name of the sales company, and the sales company sold the goods to the customer, and after that Mr. Lovegrove dropped out. He had, as agent for the company, secured the customer. He had brought the sales company, who was selling, into touch with the customer, and he dropped out. The sales company sold to the customer and the customer was to pay the sales company; but that Mr. Lovegrove might not be held up by delay in payment by the customer the sales company was immediately to pay to Mr. Lovegrove 90 per cent. of the value of the invoice of the goods. The effect of that was that Mr. Lovegrove got immediate payment from the sales company. The sales company, who had possibly to wait some time for its money, obtained an advantage in that it secured the balance, the 10 per cent., for its profit. Otherwise, the business went on as before, with this definite alteration, that the seller to all the customers was no longer to be Mr. Lovegrove but the sales company. It is no use saying : " Oh, the sales company was Mr. Applestone, so that one must treat the company as merely being a device or stratagem." The sales company was a definite entity, and it is in law entitled to be respected as such. Equally, Mr. Lovegrove, having regard to the testimonial given him by the learned judge, is entitled to say that he is an honest manufacturer with a good business, but at the moment—he hoped only temporarily—in financial difficulties.

That being the system, the sales company effects the sales to the customer, but the company then has, as any other seller has, to pay the source from which it obtained the goods with which to fill the contract made between it and the customer, and so it pays Mr. Lovegrove. The sales company does not get or hold the goods, it does not deal with the goods until the contract has been made on its behalf by the agent, Mr. Lovegrove, and it is then that the invoice records the true nexus between the seller and the customer, and the sales company has to pay for the goods which it requires. There is, therefore, no time at which the sales company is holding the furniture as security. It does not want the goods until it has the contract to fulfil, but it then requires the goods and has to pay for the goods that are so taken.

Our attention was drawn to a document which appeared in the correspondence. It was a circular sent out by the sales company to the customers announcing to them that "a new company has been formed under the name of G. Lovegrove & Co. (Sales), Ld., and in future all sales will be made through this company and all payments should be made to it." That is signed by the sales company, and it contains this sentence: "By forming an entirely separate sales unit we hope to be able to improve upon our service to you." It is quite true that that document may be ineffective for what is implicit in it—namely, that the sales company in future are to represent Mr. Lovegrove—because it is not signed by Mr. Lovegrove, but, taken at its face value, it seems to be a clear indication by the sales company that in future the sales are to be made through that company and that they are to receive the value of the invoice.

Other documents to which we have been referred are the invoice, which is undoubtedly from the sales company, and two documents, a delivery note and a signature note, which do not contain the sales company's name. They are subsidiary documents to the invoice; the primary document which contains the contract is the invoice. It might have been wiser, or it might have been better, that the sales company's name should have appeared on the delivery note and the signature note, but that matter is easily overcome by the fact that Mr. Lovegrove was acting in this matter as agent for the sales company. What is the objection to that method of doing business? This is not a case in which some document is put forward to mask a device or stratagem for deceiving persons; it really is an agreement entered into for the purpose of enabling Mr. Lovegrove to have money more quickly and more certainly on the sale of his goods, and one ought not to look at such a document with a sinister eye.

Farwell J. found great difficulty in the case, and I share those difficulties; but I have come to a different view from that which he took, because after the advantage which we have had of the discussion on both sides it appears to me that the definition in the Bills of Sale Act, 1878, which we have to consider does not cover this document. The definition which is said most nearly to cover it is that in s. 4 of the Act of 1878, which contains the interpretation to be given to the expression " bill of sale." But it is important to remember s. 3 of the Act of 1878, which is as follows: " This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale." That section stood, even after the Act of 1882 had been passed. We have therefore to bear in mind that the real purpose of making bills of sale the subject of a strict Act of Parliament was the danger that there should be some secret document enabling some person unknown to seize or take possession of personal chattels. The words said to cover the present case are " assurances of personal chattels " which are contained in s. 4 of the Act of 1878, and the context in which they occur is " inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels."

Is the document in question an assurance of personal chattels? Where is the assurance given of personal chattels? It does provide a code by which the sales in the future of the manufactured articles of Mr. Lovegrove are to be carried out, but there is, in fact, no assurance given to the sales company of the actual goods themselves. On the question of what is an assurance see *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) Bowen L.J. (2), dealing there with some of the various cases which raised the question whether the transaction was defeated if the bill of sale was avoided, referred to *Woodgate* v. *Godfrey* (3), "where the then Master of the Rolls (Sir George Jessel), Bramwell L.J. and the present Master of the Rolls (then Brett L.J.) reverted, in my opinion, to the older view, and I think the sounder view, and again unmistakably laid down, as it seems to me, the true doctrine, that a document was really not a bill of sale unless it was an assurance." And later he said (1): "Now if a receipt was an assurance of personal chattels, it was struck by the older Act under the general words. If it is not an assurance of personal chattels, it is not struck by this Act. The truth I think is, that the draughtsman had in his mind fictitious transactions—where receipts were used to give a colour of assurance—for assurance there was, properly speaking, none, because the document was not intended to have any effect unless the transaction was revealed to the eye of the world—and in his anxiety to bring within the operation of the Act fictitious assurances, he treats them as if they were real assurances."

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(1) (1887) 35 Ch. D. 191.

(2) Ibid. 212.

(3) (1879) 5 Ex. D. 24.

I think one has to test the application of s. 4 by asking oneself: Is the document one whereby some real assurance in respect of personal chattels was given by Mr. Lovegrove to the sales company? and, after a careful examination of the document, I answer the question "No." I come, therefore, to the conclusion that the document cannot be avoided as coming within the ambit of the Bills of Sale Acts.

There is one more claim suggested. It is asserted in the pleadings that s. 43 of the Bankruptcy Act, 1914, applies to avoid the agreement as an assignment of future book debts. That point was not much insisted on by the learned judge, and, indeed, in his judgment he says: "There were no doubt, from his [Mr. Applestone's] point of view, objections to taking a charge upon future debts in the possible event of the subsequent bankruptcy of Mr. Lovegrove; and this device was adopted in order to enable loans to be made to Mr. Lovegrove by Mr. Applestone, security being given to Mr. Applestone by a charge on the chattels of Mr. Lovegrove, chattels remaining in the possession of Mr. Lovegrove until they actually passed into the hands of the ultimate purchaser." So that the learned judge, in so far as he deals with this point at all, records that, whereas there was a choice of two methods of doing it, the

(1) 35 Ch. D. 213.

particular method actually adopted was chosen to avoid the possible danger of taking a charge on the future debts.

In considering the application of s. 43 of the Bankruptcy Act, 1914, I think that regard must be had to the reason for the transaction and full note must be taken of what our decision is on the bill of sale point. And when I come to consider the purport, meaning, and intention of the agreement of September 1, 1933, I cannot find just or sufficient ground for saying that it is an assignment of future book debts. The agreement is made for twelve months, and we were told that there was evidence describing how the figure of 2500*l.*, which was to be the effective limit of the right of the sales company to its profits on the sales which took place, was arrived at. There was to be that limit because of the figure given by Mr. Lovegrove as the ordinary result of his trading for twelve months, which was the first limit fixed for the duration of the agreement. It might be said that, inasmuch as there was a reverter of a sum beyond 2500*l.* to Mr. Lovegrove, that afforded some ground for suggesting that the true result of the agreement was to effect a mortgage of the future book debts; but that seems a little artificial, and, after all, it is a case in which the trustees have to make out their case and to establish that the effect of the deed is that it is a charge or mortgage on future debts within s. 43.

To my mind, when one has come to the conclusion that the deed is an honest one, that the transaction was not intended to cloak some improper stratagem, but was made by honest persons in the course of a high class and honest business, and that the Bills of Sale Acts do not apply to ruin the document, it follows that the real purport of the document ought to be accepted—namely, that it was for the purpose of enabling Mr. Lovegrove to obtain an earlier payment of the aliquot part of the purchase price paid for the furniture, and not for any other purpose. In these circumstances it appears to me that the trustees have not established that the document is within s. 43, and their case fails on that point also, although I quite agree that it was open to them to take it.

On these two grounds I have come to the conclusion that the document is not avoided, and the appeal must be allowed, with costs.

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ROMER L.J. I have come to the same conclusion. To appreciate the true meaning and effect of the documents with which we have to deal in this appeal it is essential to bear in mind the circumstances in which Mr. Lovegrove found himself on the date when they came into existence. Mr. Lovegrove was a manufacturer of furniture, carrying on business on a fairly extensive scale at High Wycombe. The customers who bought his furniture, however, were people who, for the most part, expected to obtain from him a rather extensive credit—three months, I think, was the usual credit which they expected and in fact obtained from him. The result was that Mr. Lovegrove at times found himself rather short of liquid resources, and by September 1, 1933, he was undoubtedly in financial difficulties, arising from the cause which I have mentioned, and he approached Mr. Applestone with a view to obtaining financial assistance from him. Mr. Applestone was prepared to make advances of some 5000*l.* on security of the then outstanding book debts of Mr. Lovegrove, amounting to 5500*l.* odd, and on September 1, 1933, a mortgage of those existing book debts was effected to secure to Mr. Applestone the repayment of 5094*l.*, which he then advanced to Mr. Lovegrove.

It was apparent, if Mr. Lovegrove's business was to continue in the future, that the customers would still require this inconveniently long credit, and that Mr. Lovegrove must make some provision for obtaining advances pending the expiration of the credit if his business was to be carried on, otherwise he would shortly find himself again in the same difficulties as before. Mr. Applestone, again, was willing to help him, and Mr. Applestone's assistance could be provided for in one of two ways. The first and obvious way was for Mr. Applestone to agree that as and when Mr. Lovegrove entered into a contract with any customer for a sale to that customer of furniture, Mr. Applestone should then and there advance to Mr. Lovegrove, say, 90 per cent. of the purchase price, taking a charge on the purchase price to secure the money which he advanced to Mr. Lovegrove. There were obvious disadvantages attached to that course which were only too clearly seen and realized by the solicitor advising the parties at the time. If Mr. Lovegrove should subsequently go bankrupt, s. 43 of the Bankruptcy Act, 1914, might have the effect of avoiding the whole transaction, and so the parties, as I understand it, and as found by Farwell J., deliberately adopted the alternative course.

The alternative course was obvious. When Mr. Lovegrove found the customer for his furniture, he would get Mr. Applestone to enter into a contract with the customer for the sale of the furniture to the customer, giving the customer the ordinary three months' credit, and to enable Mr. Applestone to complete his contract with the customer Mr. Lovegrove at the same time would enter into a contract with Mr. Applestone to sell that furniture to Mr. Applestone, say, at 90 per cent. of the invoiced price payable at once. In that way Mr. Lovegrove would get his 90*l.*, and Mr. Applestone would be repaid his 90*l.*, with something representing interest, when he received the 100*l.* from the customer. Mr. Applestone was willing to adopt that scheme, subject, however, to certain conditions. One of these conditions arose out of the fact that it was obviously no good for Mr. Lovegrove to run round and try to find customers to buy his furniture from Mr. Applestone, because the parties did not know Mr. Applestone. If, on the other hand, a company was formed preserving the name of Lovegrove, the customers might be willing to give orders to that company, and so a company was formed to take the place of Mr. Applestone in the transaction. It was a perfectly innocent thing to do. The use of that name by the company preserved the connection which it was necessary to preserve in order that Mr. Lovegrove might get the contracts.

Another condition made by Mr. Applestone arose from the fact that if he were going to purchase these goods from Mr. Lovegrove and sell them to the customers the customers might afterwards make default, and so Mr. Applestone said :

" I shall not be getting the customers but you, Mr. Lovegrove, will, and you ought to be responsible for the solvency of the customers.'' Mr. Applestone therefore said, in effect : " You must guarantee the payment of the purchase price by the customers to whom I agree to sell the furniture."

Another condition made by Mr. Applestone was that the sales to be made to customers found by Mr. Lovegrove were not to be less than a certain amount in the year. Not in opposition to this, but at the same time as that condition was made by Mr. Applestone, Mr. Lovegrove himself made a condition. He pointed out that the profit made out of these transactions might be a very large one, depending on the amount of the sales to customers ; and so Mr. Applestone agreed with Mr. Lovegrove that the profit coming to him (Mr. Applestone) out of the transaction should not exceed 2500*l.* in the year.

If the sale by Mr. Applestone to the customer was a real sale and the sale by Mr. Lovegrove to Mr. Applestone was a real sale, the trustees in bankruptcy could not in any way object to the transaction. It is, however, said by the trustees in bankruptcy that these were not real sales at all ; that the documents, to which I will refer in a moment, merely pretended to effect a sale, but that the real substance of the transaction was that Mr. Applestone was lending to Mr. Lovegrove 90 per cent. of the purchase price. But the document, on the face of it, provides for real sales, and, indeed, if the conditions to which I have referred had not been inserted in the document, I do not think that we should have heard the trustees contending that the transaction did not involve real sales by Mr. Lovegrove to Mr. Applestone. They were real sales if the conditions were not there, and the imposition of the conditions does not, in my opinion, prevent them from being real sales.

Supposing, however, that the trustees are right, and that, so far as the sales to Mr. Applestone by Mr. Lovegrove were concerned, it was merely a scheme by which Mr. Applestone was to advance money up to 90 per cent. of the purchase price to Mr. Lovegrove, I still fail to see how in any sense it can be said that the sales company has obtained a charge on any single

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stick of furniture manufactured by Mr. Lovegrove. I asked Mr. Stable if he could suggest any circumstances in which the sales company could seize any part of the furniture which had been the subject-matter of the sale for the purpose of enforcing the payment to Mr. Applestone of the moneys which, according to this hypothesis, Mr. Applestone had lent to Mr. Lovegrove. Mr. Stable was unable to tell me, really, of any circumstance in which such a right to seize the furniture appeared, and, indeed, there was no such thing. So whether this was a real sale or merely a scheme by which Mr. Applestone was to advance money to Mr. Lovegrove, in neither case was a charge created on the furniture, and, therefore, there was no bill of sale on the furniture to be avoided by the Act of 1882.

Then it is suggested that, if the Act of 1882 does not avoid this transaction, the Act of 1878 would have that effect. Supposing the true effect of this transaction was that Mr. Applestone was advancing 90 per cent. of the purchase money from time to time to Mr. Lovegrove, it might be said that this transaction was effected for the purpose of bringing into existence book debts which, though in the name of the sales company, would have been held by the sales company, when received, as trustees for Mr. Lovegrove, subject only to the sales company repaying itself out of the book debts the moneys which it had advanced. There are, indeed, in the conditions to which I have referred, circumstances which might give rise to the suggestion that the whole transaction was no more than that; but I have already stated that, in my opinion, if those circumstances really be considered, they are not sufficient to induce the Court to disregard the form of the document and to hold that the substance was something different from the form.

In my opinion, the trustees have not succeeded in discharging the onus which lies on them of showing that the form which the transaction took on September 1, 1933, was not in truth the substance, but that the substance was something else.

For these reasons I have come to the conclusion that this appeal must be allowed.

MAUGHAM L.J. I am of the same opinion. In the first instance, it is important to remember the object of the Bills of Sale Acts of 1878 and 1882. Lord Halsbury L.C. said, in *Charlesworth* v. *Mills* (1), that the object of the Bills of Sale Acts, 1854 and 1878, was "to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership however of which they had parted with." He added: "The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which nevertheless the ownership was no longer theirs, those goods and chattels should be subject to the execution of bona fide creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons." He also pointed out that the Act of 1882 was directed to a totally different subject-matter—namely, to protect impecunious debtors—and therefore insisted on a particular form of words which should plainly express the nature of the contract as to the loan and the security for the loan." I think it may be useful, as I have said, to bear that in mind, because essentially the transaction here was not one within the Act at all. Of course, it might come within the Act for technical reasons, but essentially it really was not within the Act.

The transaction here, reduced to its simplest form, and considering it only in relation to particular pieces of furniture, is no other than this. Mr. Lovegrove, who was manufacturing some furniture, had a customer who was willing to give a particular price for it on credit terms. Mr. Lovegrove agreed with Mr. Applestone that when the furniture was ready he would sell it to Mr. Applestone—because for this purpose I am going to leave out the company altogether—for the price which the customer was willing to give for it less 10 per cent., but on the term that Mr. Applestone should pay immediate spot cash. Thereupon Mr. Applestone was to sell the furniture on credit terms to the customer at a profit, say, of 10 per cent. To that transaction, so far as I can see, there is no objection at all from the point of view either of the

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(1) [1892] A. C. 231, 235.

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Bankruptcy Act or of the Bills of Sale Acts. It would not be a transaction by which false credit was given to Mr. Lovegrove by people who supposed him to be the owner of the furniture at a time when the furniture was no longer his. The essence of it would be that at the moment when Mr. Lovegrove parted with the furniture he would get cash for it. That is no more objectionable than any other ordinary contract of sale and purchase entered into by a trader. To my mind, it was none the worse from the point of view of those Acts that Mr. Lovegrove agreed that, if the customer did not pay Mr. Applestone, he himself would pay, for that would be merely consistent with the view that if Mr. Lovegrove was the man who was finding the customer he ought to find a good one. I do not shrink from saying that the obvious intention of the whole transaction as I have described it was to enable Mr. Lovegrove to go on carrying on his business, and Mr. Applestone might well be influenced by friendly feelings in agreeing so to assist Mr. Lovegrove.

It must be admitted that the document by which the more elaborate transaction which is involved in this case was carried out is an agreement which required very careful consideration by the Court. It was dated September 1, 1933, and by a document of even date there was a transaction by which, beyond question, Mr. Lovegrove borrowed a sum of 5000*l.* odd on the security of the existing book debts specified in a schedule. The learned judge seems to have thought that, because that transaction bore on the face of it the nature of a mortgage, that was some reason for thinking that the second transaction, that which purported to be a sale and purchase, might also be considered to be a mortgage. But, with all respect, I do not think that there is much weight to be attached to that argument. The two documents are, it is true, of even date, but I think that on the face of them they were, and were intended to be, very different transactions.

The essence of the agreement of September 1, 1933, so far as sales and purchases by the sales company are concerned, is that there should not be a sale to that company until the purchaser, the customer found by Mr. Lovegrove, was ready to purchase at an agreed price. What was contemplated, and so far as I know what was carried out, was that, when the furniture was ready and the purchaser required delivery, the company should send an invoice accompanying the goods purporting to represent a sale by the company to the customer, at the larger price, but on credit terms. The smaller sum then became due from the company to Mr. Lovegrove.

There are several provisions in the agreement which require consideration. One is the paragraph at the end of clause 5 by which Mr. Lovegrove agreed that the total of the prices for goods purchased from the company should not be less than a certain sum. Two others are clauses 7 and 8, and finally there is the beginning of clause 13, all of which do require consideration and they are certainly most unusual clauses to find in a contract of sale and purchase between a trader and an ordinary purchaser. I do not hesitate to say that this transaction was unusual, and that it was in effect a transaction by which Mr. Lovegrove was financed by Mr. Applestone or his company—it matters not which—so that he was able to carry on the business. But when it is considered that the mischief aimed at by the Bills of Sale Act or of the Bankruptcy Act was not being brought into play by anything that was done, I for my part do not see why we should be astute to come to the conclusion that this was anything other than an unusual form of sale and purchase between Mr. Lovegrove and the company, the intention being that the company should never hold the furniture in its own possession, but should immediately cause a resale to be made to the old customers of Mr. Lovegrove, so that he would be repaid out of the purchase price.

It is beyond all doubt that in a case such as this one does not look merely at the form of the document which is alleged to be a bill of sale. The true nature, not the form of the transaction, must be regarded, and if the document itself in effect is only a cloak for what is really a mortgage of chattels or a pledge of chattels, the form may be disregarded. The matter was elaborately considered by this Court sitting

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with five learned Lords Justices in *In re Watson.* (1) Whether a transaction purporting to be a sale and purchase of goods is no more than it appears to be on its face, or whether it really is a loan on security, and therefore a document which might be hit by the Bills of Sale Acts, is a question to be determined by ascertaining the true intention of the parties. That true intention may appear either from the document itself, because although it uses the language of sale and purchase, it might very well on its mere words appear to be nothing other than a loan on security, or it may appear from any collateral agreement or other document which would show that the true intention was a loan on security, or finally the fact might be ascertained by parol evidence, more especially parol evidence which would suggest some fraud on the part of the person who was either the vendor or the borrower, whichever view the Court should take.

In the present case on the agreement itself I see no reason for coming to the conclusion that the transaction was anything but a somewhat unusual sale and purchase—a sale by Mr. Lovegrove and a purchase by the company. The learned judge in his careful judgment has told us that Mr. Lovegrove was a very frank and honest witness, and the circumstances under which he negotiated this agreement have already been detailed by the Master of the Rolls. They are perfectly credible and honourable to him, and there was nothing, as I have said, in the real nature of the transaction which suggests in the remotest degree any intention to defraud anybody.

Accordingly, I think that the learned judge was wrong in thinking that there was anything which ought to be regarded with suspicion or which should be treated as being a cloak for the true transaction. I come to the conclusion that, unusual as the agreement of September 1, 1933, was, it represented the true intention of the parties. If that is so, that seems to me to be the end of the argument that it is a bill of sale, because in terms it is not.

The question which might perhaps have presented more difficulty was the question with regard to the possibility of

(1) (1890) 25 Q. B. D. 27.

the agreement being really one for a loan with security on the purchase price of the goods from the company. On the whole, I do not think it is necessary to add anything on that matter beyond what has already been said. It was not, I think, a point greatly relied on by the trustees, but in any case the onus of establishing such a proposition would lie on the trustees, and that, I think, they have failed to establish. Moreover, for the reasons which I have already given, I think that the true nature of the transaction must be taken to be that actually expressed in the document. For these reasons, in addition to those given by my brethren, I think that the appeal must be allowed.

Appeal allowed.

Solicitors: *Alec Woolf & Co.; Wordsworth, Marr, Johnson & Shaw.*

H. C. G.

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CLAUSON J.
Oct. 30, 31.
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[1932. L. 1925.]

Copyright—Infringement—Author anonymous—Action by Publisher—Deceased Publisher of original work—Absence of proof of present Publisher's derivative title to Copyright—Presumption (for purposes of infringement action) of ownership of Copyright in favour of Publisher—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 6.

By s. 6, sub-s. 3, of the Copyright Act, 1911: " In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—(*a*) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work; (*b*) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein."

In 1896, there was published a new edition of a handbook entitled "The Perfect Ceremonies of Craft Masonry" which, for the purposes of the Copyright Act, 1842, was a new work, but the name of its author was unknown. That edition and all the subsequent editions, which were mere reprints of the 1896 edition and contained no new or original work, bore on their flyleaves the imprint: "Privately printed for A. Lewis." From about the year 1906 to the date of his death on August 2, 1909, one John Hogg carried on the business of publishing masonic rituals at 13 Paternoster Row, London, under the name of A. Lewis. Thereafter Godfrey Hogg down to the date of his death in 1922 and thenceforth his widow, the plaintiff Charlotte Hogg, carried on the same business under the name of A. Lewis.

In an action by Charlotte Hogg, who claimed to be the owner of the copyright in the work entitled "The Perfect Ceremonies of Craft Masonry," for infringement thereof the defendants put in issue the existence of any copyright in the work and the title of the plaintiff to copyright, if any, therein; and, in the absence of proof of her derivative title to copyright, the plaintiff relied on s. 6, sub-s. 3 (*b*), of the Copyright Act, 1911, and claimed that she, as publisher whose name was imprinted on the flyleaves of her editions of the work, must be presumed to be the owner of the copyright in the work:—

Held, by Clauson J. and the Court of Appeal, that the presumption referred to in s. 6, sub-s. 3 (*b*), of the Copyright Act 1911, that the person whose name is indicated on an anonymous work as the publisher thereof is the owner of the copyright therein, is based on the hypothesis that the publisher whose name is so indicated is not the real owner of the copyright therein and is raised merely for the purpose of giving such a publisher a "locus standi" in proceedings for infringement taken by him under that section on behalf of the real owner of the copyright, and that, accordingly, and in view of the fact that the reprints of the 1896 edition issued by the plaintiff could not be the subject of copyright, the presumption did not enure to the benefit of the plaintiff further than as aforesaid in the absence of proof of her derivative title to an antecedent copyright.

SPECIAL CASE.

This action was commenced on August 10, 1932, for infringement of the copyright in a literary work entitled "The Perfect Ceremonies of Craft Masonry" (hereinafter referred to as "the work") of which the plaintiff, Charlotte Hogg, claimed to be the owner; the relief claimed being by way of injunction and damages. On February 8, 1934, the parties to that action agreed that the claims and issues arising therein should be referred to arbitration, and accordingly an arbitrator was duly appointed to whom the matters in dispute in the action were referred for his award. In pursuance of such reference and the provisions of s. 7 of the Arbitration Act, 1889, the arbitrator stated his award in the form of a special case for the opinion of the Court.

The following are the material facts which emerge from the statements of the arbitrator in the special case: In the year 1896, there was published a new edition or compilation of a little handbook for the use of Freemasons entitled "The Perfect Ceremonies of Craft Masonry," of which, since the first edition in 1874, there had been several fresh editions. The edition of 1896, for the purposes of the Copyright Act, 1911, constituted a new work; but there was no evidence to prove who was the author or compiler of that new edition nor whether, at the date of the issue of the writ in the action, he was living. That edition and the subsequent editions of 1901, 1905 and 1906 bore at the bottom of the flyleaves the words "Privately printed for A. Lewis." No author's name appeared in any of those editions. It was proved that from about the year 1906 down to the date of his death on August 22, 1909, one John Hogg carried on the business of publishing Masonic Rituals at No. 13 Paternoster Row, London, under the name of A. Lewis, his business being managed for him by his nephew Godfrey James Hogg as a paid servant: and further, the arbitrator drew the inference that John Hogg had in 1896 carried on the same business under the name of A. Lewis; and he went so far as to draw the inference that any copyright which at the date of the death of John Hogg could have existed in any part of the work or any edition thereof was at that date legally vested in him. John Hogg by his will bequeathed his business, goodwill and stock in trade, including the masonic rituals and books issued by him under the name of A. Lewis, to Godfrey J. Hogg subject to the performance of a certain condition, compliance with which was not proved. After the death of John Hogg, Godfrey J. Hogg carried on the business under the name of A. Lewis down to his death in 1922; from and after which date the plaintiff, Charlotte Hogg, the widow of Godfrey Hogg, carried on the said business as her deceased husband had done, under the name of A. Lewis.

Between the years 1906 and 1924, several editions of the work were successively published, all of which bore at the bottom of the flyleaves the words "Privately printed for A. Lewis" or "Privately printed for A. Lewis, 13 Paternoster Row." No author's name appeared on any of those editions. There was no evidence that anybody other than John Hogg, Godfrey J. Hogg or the plaintiff published similar works under the name of A. Lewis. Three other editions were published by the plaintiff in 1926, 1929 and 1931, all of which bore on the flyleaves the words "Privately printed for A. Lewis" or "Privately printed for A. Lewis, 13 Paternoster Row." There was no proof that any copyright which might have been vested in John Hogg passed to Godfrey J. Hogg or to the plaintiff. All the editions of the work issued after 1896, including those of 1926, 1929 and 1931, were mere reprints of the original 1896 edition, and none of them contained any new or original work which could constitute it a new work for the purposes of the Copyright Act, 1911.

In the action the plaintiff alleged that she was the owner of the copyright in the work and in the successive editions published from 1874 to 1929; and she charged the defendants with having prepared, printed and distributed, without the plaintiff's consent, a work entitled "Emulation Working" which contained "Ceremonies Ritual and Addresses" the text of which was copied, directly or indirectly, in whole or in part, from the 1929 or some earlier edition of the plaintiff's work and was an infringement of the plaintiff's copyright in those editions.

In the particulars delivered by her she stated that she acquired the copyright in the 1926 and 1929 editions of the work at or about those dates by virtue of s. 5, sub-s. 1 (*b*), of the Copyright Act, 1911, as the employer of E. N. London and A. H. Wodehouse, who in the course of their employment under a contract of service with the plaintiff compiled those two editions.

The defendants put in issue the existence of any copyright in the work in which the plaintiff claimed copyright and the title of the plaintiff to copyright in the work or in any of the successive editions thereof and denied infringement.

The plaintiff admitted that, so far as regarded all editions before 1926, she relied solely on s. 6, sub-s. 3, (*b*), of the Copyright Act, 1911.

By his award the arbitrator stated that in his opinion, as to all the editions before 1926, the plaintiff was only entitled to rely on cl. (*b*) of s. 6, sub-s. 3, of the Act of 1911 and on the fact that on those editions her name or the name of her predecessors was indicated as being the publisher of the work, and that if, in accordance with the facts, any presumption was raised under cl. (*b*), for all the purposes of the action the owner of the copyright in any of the editions of the work before 1926 in which copyright could, at all material times, have existed, was in some person other than the plaintiff, and that (which was not disputed) no copyright could exist in the 1926 or in any of the subsequent editions separately from previous editions, with the result that the plaintiff was not entitled to any of the relief claimed by her in the action, and so he awarded.

Schiller K.C. and *Macgillivray* for the plaintiff. The arbitrator put a too narrow construction on s. 6, sub-s. 3 (*b*), of the Act. According to his view John Hogg, who traded under the name of A. Lewis, the name that appeared on the original 1896 edition of the work as the publisher, was the only person entitled to the benefit of the presumption of ownership of the copyright, and the plaintiff, even though she should prove a derivative title from John Hogg, cannot claim the benefit of that presumption under cl. (*b*). There is sufficient evidence of the plaintiff's derivative title to the copyright from John Hogg, who died in 1909, having bequeathed to Godfrey his business and the goodwill thereof. But failing proof of her derivative title, the clause in question must be given a liberal construction. The plaintiff here comes within the literal wording and good sense of the clause: she is the publisher whose name is indicated on the work and therefore the presumption is raised in her favour that she owns the copyright. The presumption is not restricted by the clause in favour of the first publisher of the work: the Legislature had in mind the convenience of extending the application of the presumption in favour of the publisher who takes proceedings for infringement after the former publisher's death: "If no one is named as author of the work . . . . then the presumption arises that the person who is named as publisher . . . . of the work is, for the purposes of the proceedings, the owner of the copyright. . . . . The object of the presumption is to enable an anonymous author to preserve his anonymity in any legal proceedings he may take to protect his copyright": Copinger on the Law of Copyright, 6th ed., p. 176.

Fergus Morton K.C. and *Geoffrey H. B. Streatfeild* for the defendants. According to the finding of the arbitrator none of the editions issued by the plaintiff contained any new or original literary work; they were merely reprints of the editions issued by John Hogg deceased. In the absence of the author's name from the work, cl. (*b*) of sub-s. 3 of s. 6 applies: the presumption was capable of being raised in favour of A. Lewis, whose name was indicated on the original and subsequent editions issued by John Hogg; but the plaintiff in these proceedings is not A. Lewis and, as the reprints of the 1896 original work issued by the plaintiff were not the subject-matter of copyright, she cannot claim the benefit of the presumption under that cl. (*b*). This action is brought by one who is not the publisher of the work—namely, the work which is subject-matter of copyright: she is merely the publisher of copies of that work: see Copinger on Law of Copyright, 6th ed., p. 176.

Clauson J. This matter comes before me in the form of a special case stated by an arbitrator, in which a question arises, requiring careful examination, as to the true meaning

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of cl. (*b*) of sub-s. 3 of s. 6 of the Copyright Act, 1911, and it arises under circumstances which for the purpose of considering the construction of that section I think I can state quite shortly.

In 1896, a work was published which, for the purposes of this part of the case, was, I assume, anonymous, bearing the imprint: " Printed for A. Lewis." Who was the author of that work the Court does not know. The work passed through several editions which were reprints of it with unsubstantial alterations, subject only to this, that the 1906 edition contained certain additional matter, but no alterations of the matter contained in the previous editions. Again, the Court does not know who was the author of that 1906 edition. That 1906 edition again bore the imprint: " Printed for A. Lewis." It is known that A. Lewis in 1906 was a pseudonym for one John Hogg. It is not known whether or not A. Lewis in 1896 was a pseudonym for John Hogg. If it were necessary for me to investigate whether or not in 1896 A. Lewis was a pseudonym for John Hogg, I should find it necessary to send this case back to the arbitrator. I will assume for the moment that not only was A. Lewis a pseudonym for John Hogg in 1906, but that A. Lewis was a pseudonym for John Hogg in 1896. The plaintiff in this action is not John Hogg. The plaintiff comes forward and claims that, although she is not John Hogg, although she is not the author of either the 1896 or the 1906 editions of the work, and although, the author of those two works being unknown, she cannot prove a derivative title to the copyright of either of those editions from the author of them, she must by virtue of sub-s. 3 of s. 6 of the Copyright Act, 1911, until the contrary is proved, be presumed to be the owner of the copyright in the work. I must read the whole section before proceeding to interpret the clause on which the plaintiff relies. Sect. 6 has in the margin " Civil remedies for infringement of copyright " and it is enacted by sub-s. 3 as follows: " In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff"—for the present I must assume that everything is put in issue—" and where any such question is in issue, then—(*a*) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work." Let me consider what the effect of that is. A.B. is suing in respect of an infringement of copyright in a book which bears on the face of the title that the author is X.Y. A.B. is entitled to say: "The Court must start with the presumption that X.Y. is the author of the work. I am not X.Y., but I am in a position to show by proper evidence that the copyright which X.Y. would have as author, if he had not parted with it, is now vested in me, A.B." Or, if the plaintiff is X.Y., the plaintiff is entitled to say: "Until the contrary is shown, I, the person whose name appears as author, must be treated as author, unless somebody proves that I am not the real author and that some other person is." Now I come to cl. (*b*) of sub-s. 3: "If no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein."

Let me pause to say that, putting aside for a moment cl. (*b*), it is exhaustively true to say that the Act treats as owner of copyright only the author of the work or an assignee of the copyright from the author or—I add this for completeness, though it is quite immaterial to anything that I have to consider—the employer of the author or the assignee of such employer under certain circumstances. But with that, in this case, I have nothing to do.

Now it is suggested that the effect of this cl. (*b*), applying it to this particular case, is that upon its true construction the publisher whose imprint appears on the anonymous work is to be treated as owner of the copyright to the same extent as if he had been the author, and that, accordingly, the plaintiff, if she proves a proper derivative title from the person whose name is so imprinted, can say: "Subject to proof of my derivative title, it must be presumed that the person whose imprint appears upon the book was in the position of the author and owner, accordingly, of the copyright, and I, through him, assuming that I prove my derivative title, must therefore be presumed to be owner of the copyright." Now is that the effect of the clause? In my view that is not the effect of it. In my view the clause in effect says that in the case of, I will call it for convenience, an anonymous work (which is not exactly exhaustive), if you find a publisher's name imprinted on it, the person so named, if he is the plaintiff in the action, is to be presumed, until the contrary is shown, to be the owner of the copyright in the work. But there is no presumption as regards anybody except that person. Accordingly, to apply the clause to the facts of the present case, if on the facts that I have stated, John Hogg, who is admitted to be a mere alias for A. Lewis, were plaintiff in this action, there would be a presumption, until the contrary was proved, that he owned the copyright. But the plaintiff is not John Hogg; and, in my view, the presumption, on production of the work, and on the supposition I have been making, is that John Hogg is the owner of the copyright and that nobody else is. If the present plaintiff desires to sue, the onus is on her to show that by some title or other she has the copyright, and that John Hogg is not the proper plaintiff but that she is. Of course, unless she can get the benefit of some presumption in this section, she admittedly cannot show herself to be owner of the copyright, because she can show no title from an author or the employer of an author. Admittedly she herself is not the author. That, in my view, is the position. The construction that I place upon this clause has a somewhat narrow operation, I agree; but it has no doubt a very convenient operation in many cases, and I cannot shut my eyes to the fact that, if the aim of this clause had been to put the publisher of an anonymous work and persons deriving title under him in precisely the same position as if that publisher had been the author of the anonymous work, the language of cl. (*b*) might have been framed in consonance with the language of cl. (*a*). But in my view cl. (*b*) is aimed at something entirely different. Whereas cl. (*a*) is aimed at the question of who is the author, cl. (*b*) is aimed purely at providing a convenient method of procedure where the person before the Court as plaintiff is the person whose name actually appears at the time on the imprint of the work the copyright in which is sought to be enforced.

Accordingly, in my view, the arbitrator was right in the view that he seems to have taken, that nothing in cl. (*b*) assists by way of presumption the case of the plaintiff. Accordingly, I will make a declaration that, in my judgment, the conclusions of law come to by the arbitrator are correct.

H. C. H.

C. A. The plaintiff appealed. The appeal was heard on February 18 and 19, 1935.

Schiller K.C. and *Macgillivray* for the appellant.

Fergus Morton K.C. and *G. H. B. Streatfeild* for the respondents.

The arguments were substantially the same as those used in the Court below.

Lord Hanworth M.R. This appeal fails. It is an appeal from Clauson J., who had to give his judgment upon a special case submitted for the decision of the Court by an arbitrator. A number of questions were submitted by the arbitrator, but Clauson J. came to the conclusion, as stated in para. 48 of the case, that the plaintiff was not entitled to the relief claimed in the action, whereupon that being so the award directed that " the plaintiff do pay to the defendants their costs of the action and reference and also do pay the costs of this my award." The action was brought to establish the plaintiff's right against the defendants for infringing a copyright which it was claimed belonged to the plaintiff. The plaintiff claimed the usual relief in an action based upon copyright—namely, an injunction to restrain the defendants from publishing, printing, and so on a book published by them entitled "Emulation Working" or any part or parts thereof which had been copied or colourably altered from the plaintiff's literary work entitled "The Perfect Ceremonies of Craft Masonry," and she also made a claim for damages and so on.

It is I think important before I go to the structure of the action and the law applicable to it that I should state what I conceive to be the facts presented to the Court by the findings of the arbitrator in the special case. They are these: that there was in the year 1874 a compilation which was entitled "The Perfect Ceremonies of Craft Masonry," little books handy for the use of persons who are Masons. Who was the original compiler or author in 1874 does not appear. There were a number of editions of that compilation, but in 1896 it appears that there was a new compilation and that that 1896 edition was sufficiently different from anything that had been published in the previous twenty-two years to constitute that edition of 1896 a new work for the purpose of the Copyright Act. So the arbitrator finds in para. 13: "I find that the 1896 edition was a new work for the purposes of the Copyright Act, but there is no evidence upon which I can determine who was the author or compiler of the said edition, nor whether such author or compiler is or was at the date of the issue of the writ in the action still alive or not." The editions which have been issued from 1896 subsequently—I need not go behind that year—are editions which declare on the title page that they are "Privately printed for A. Lewis." I read from the 1896 book. Again in 1899 there appears the same imprint: "Privately printed for A. Lewis, London, 1899." We have evidence which the learned arbitrator accepted that, at any rate, at that time and down to 1909 a man named John Hogg was carrying on a business of publishing Masonic rituals at

Paternoster Row under the name of A. Lewis. The arbitrator says in para. 5: "It is proved that from about 1906 until his death on August 2, 1909, John Hogg was carrying on a business of publishing masonic rituals at 13 Paternoster Row, London, under the name of A. Lewis. During that time the said business was managed for him by his nephew Godfrey James Hogg as a paid servant," and the arbitrator finds that John Hogg had been carrying on that business at least some time between 1901 and 1905, and he finds or infers that down to 1909 when he died any copyright which could then exist in any part of the said book or any edition thereof was legally vested in John Hogg.

I am therefore going to take it for the purpose of considering the plaintiff's rights that there was some copyright in an edition which is rooted in 1896 of which reprints were published from time to time down to 1909 and that John Hogg was the person in whom was the copyright of this edition of 1896 on which the reprints were founded, down to his death in August, 1909. By his will John Hogg bequeathed his business, with the goodwill and stock in trade thereof, including the Masonic rituals and books issued by him under the name of A. Lewis, and all his interest in the lease of the premises to Godfrey James Hogg absolutely, but upon two conditions, one of which I will treat as a condition subsequent in response to the argument of Mr. Schiller—namely, that he should pay to a certain person an annuity, by equal quarterly instalments, and subject to the proviso that within six months of the death he should execute a certain deed containing a covenant, and so forth. Now the arbitrator finds that there was no evidence sufficient to satisfy him that the second condition had been complied with. He says: "I find therefore there is no evidence as to whether or not Godfrey James Hogg either complied with the said condition or executed the deed in accordance with the proviso." It is also to be observed that so far as I can see it is not recorded or stated in the special case that there was any evidence that among the personal property of John Hogg there was at the time of his death remaining and vesting in him a copyright in the

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book of 1896. After the death of John, Godfrey James Hogg carried on his business, and died on November 7, 1922. He had married his wife previously in 1920, and upon his death in 1922 she continued to carry on the business, as it was carried on by her husband, under the name of A. Lewis, and she is the plaintiff in this action. It seems that after the death of her husband she employed two persons, a Mr. London and a Major Wodehouse, and it was by them that certain alterations and improvements were made in various reprints of this book. But it is expressly found by the arbitrator that these amendments were not sufficient to constitute any of these reprints a new literary work which could stand upon its own footing, as the subject-matter of and attracting the right of copyright.

Now those are I think all the facts which I need state, and I will, first of all, deal with the matter quite apart from a scrutiny of the statute. The plaintiff claims that she is entitled to restrain the infringement of copyright said to have been committed by the defendants. The defendants have put in issue, first, the question whether there is any copyright at all and, secondly, whether there is any copyright vested in the plaintiff. Let me assume in the plaintiff's favour that the edition of 1896 was properly the subject of copyright and that the subsequent reprints, if not actual reprints, were substantially reproductions of the work of 1896. Has it been proved that that personal property of John Hogg has passed to the plaintiff? I find myself in accord with those who have already considered this question. It appears to me that there is no sufficient proof that this copyright formed part of the personal property of John Hogg in 1909, or that it was taken by Godfrey James Hogg upon his succession, or that it has passed to the plaintiff. I think it is difficult to establish that that "successional legal right," as I will call it, is vested in the plaintiff.

I come now to consider what the claim made in the action is. I can leave out the matters that were dealt with by a previous action which came to an end by a settlement in June, 1932, and I take the amended statement of claim as asking for this: it sets out that the plaintiff is the owner of the copyright in a book called "The Perfect Ceremonies of Craft Masonry" and in the successive editions thereof issued from 1874 to 1929. It alleges that the defendants have printed a book which is an infringement, and that from and after June 2, 1932, the defendants published a book copied directly in whole or in part from the 1929 edition of the plaintiff's book, and that that is therefore an infringement. When particulars were asked for in order to ascertain with greater accuracy the actual claim of the plaintiff, which had been put at large as from 1874 to 1929, the following were given: "The copyright in the 1926 and 1929 editions was acquired by the plaintiff respectively in or about the said years under s. 5, sub-s. 1 (*b*), of the Copyright Act, 1911, the same being compiled by Edmund Neville London and Arthur Hugh Wodehouse in the course of their employment by the plaintiff under a contract of service." That is a definite statement that the plaintiff relies on s. 5, sub-s. 1 (*b*), whereby the ownership of a copyright is given to the employer of the author who made the literary product under a contract of service or apprenticeship and in the course of the employment. It will be seen, therefore, that the plaintiff claims the two editions of 1926 and 1929 as having been made for her by these persons under a contract of service, she being the employer. But on the facts as found in the case that work or the services rendered by those two persons did not enure to give the result of their work a separate and independent copyright. The copyright originated and stood on the work of 1896, and these later editions, successively issued from time to time, whether in 1926 or 1929, derived their copyright from the original work and did not stand by themselves so as to be new products in either of those years to which s. 5, sub-s. 1 (*b*), would apply.

It therefore appears on the facts that the plaintiff cannot declare that she was the owner of a new copyright which dated either from 1926 or from 1929, and so she relies on a presumption which is given under s. 6, sub-s. 3. That section was doubtless put in to facilitate the enforcement of rights against infringers in cases where works have been published anonymously but which have this authorization, that they are published by a publisher whose name appears as an imprint at the outset of the work. Sect. 6 deals with civil remedies, and sub-s. 1 states that the owner of the copyright shall be entitled to remedies by way of injunction and so on. By sub-s. 3: " In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff."

Both those things are put in issue in the present proceedings, and we have to deal with the particular case which is met by cl. (*b*) of sub-s. 3, which says: " If no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein." I am going to take it that the words " Privately printed for A. Lewis " are sufficient to satisfy the words that there is the name of a publisher " indicated thereon in the usual manner." What does the clause then provide? It states that a person whose name is so indicated " shall . . . . be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein." That seems to me in clear terms to indicate that for the purposes of the proceedings the person who can say that he bears the name indicated on the work is to have a locus standi as the plaintiff to enforce his rights against an infringer. He can without disclosing the true author's name stop the infringement. But does the clause go beyond that? Is it intended to enure for the benefit of persons whose names are not so printed or indicated and who cannot prove a derivative title from an antecedent copyright? Is it intended to give such a person a derivative title enforceable in the existing action? I cannot think that the clause is intended to have so far-reaching an effect. It appears to me that it is to give a proper start to proceeding against an infringer and that until the contrary is proved the action can be treated as properly constituted. I think that Mr. Fergus Morton is right and that the judge is right in saying that the words are "to be" and ought not to be interpreted as being "to have been"; that they are, so to speak, of present force and validity and are not retrospective in their effect. Then come the words "unless the contrary is proved, be presumed to be the owner of the copyright in the work." In the present case we have got something more than that. If it be accepted on the hypothesis which I propose that John Hogg was the owner of the copyright down to 1909, there is difficulty in tracing that copyright to the plaintiff, and, indeed, the arbitrator says that it was left open what had happened to the copyright at a later date. In other words, the mere presumption given by the clause is qualified by reason of the fact that it was shown on the hypothesis which I have proposed that John Hogg had had a copyright, but what has happened to that is not certain except that there is no proof that it has derivatively come into the possession of the plaintiff.

I want to refer now to one more paragraph. I think para. 39 of the case shows that in truth and in fact the real claim of the plaintiff in the present case was that she relied on s. 6, sub-s. 3, cl. (*b*), of the Copyright Act, 1911, and the fact "that on such editions the name of the plaintiff or her predecessors was indicated as being the publishers and on the order in the previous action, and that upon the strength of the said statement the Master made no order for particulars as to the mode of acquisition of copyright in such editions." I think that means that it was intended to rely on the presumption, and the plaintiff was not in effect going to show what was the derivative title that she set up. But what has happened in the action is that it has been now shown that there was, on a hypothesis favourable to the plaintiff, an original copyright in 1896, but that it has not been shown that that has become vested in the plaintiff.

Having regard to the view I take of sub-s. 3, cl. (*b*), and which the judge took, I think that the presumption the plaintiff asks us to accept on the words of the section goes beyond those words and does not enure to establish the plaintiff's right in the present case, a right which is contested both as to the existence of a copyright and as to the vesting of it in the plaintiff.

For these reasons it appears to me that this appeal must be dismissed with costs.

Romer L.J. I have, I confess with considerable hesitation, arrived at the same conclusion. Let me first refer to two findings of the arbitrator going to the root of the matter which we have to decide. In para. 13 he says: " I find as a fact that the differences between the 1874 and the 1896 editions as set out in the document E.N.L.1 would, if wholly or mainly due to changes made for the first time in the 1896 edition, be sufficiently substantial to constitute that edition a new work for the purposes of the Copyright Act." In para. 15 he finds as follows: " Since 1896 there have not been in any edition . . . . alterations sufficiently substantial . . . . to constitute any such edition a new work for the purposes of the Copyright Act." Having regard to his finding that the 1896 edition was a new work for the purposes of the Copyright Act, it follows that in that year there became vested in the author of that work a statutory copyright under the Act of 1842 and that on the coming into operation of the Act of 1911 there was substituted for that copyright a new statutory copyright created by the Act of 1911, and that new statutory copyright would vest in the author or those claiming under him. It follows from that that when the plaintiff in this case issued her writ on August 10, 1932, apart from the provisions of sub-s. 3 (*b*) of s. 6 of the Act of 1911, she could not have succeeded in her action unless she proved that she was the author of the work, or an assignee of the author, or was constituted the owner of the copyright by virtue of the provisos to s. 5 of the Act of 1911 or the statutory provisions in the earlier statute which those provisos reproduced.

In para. 19 of the special case the arbitrator does infer as a fact that any copyright which at the date of the death of John Hogg could then have existed in any part of the book or any edition thereof was at the date of his death legally vested in him. I have not the least idea really how it comes about that the arbitrator finds himself justified in inferring that as a fact. But I do not think we have to consider whether any such inference could be properly drawn or not, and for this reason, that the plaintiff by her particulars delivered in the case has confined her right to sue to the rights which were given her by the sub-section I have mentioned: s. 6, sub-s. 3 (*b*), of the Act of 1911. Further, I agree with what the Master of the Rolls has said, that, even assuming that copyright in the work was vested in John Hogg at the time of his death, there is no proper proof that that right has passed to the plaintiff. Assuming that it did pass under his will to Godfrey James Hogg, I can find no evidence that it passed from Godfrey James Hogg to the plaintiff. The plaintiff, therefore, is both by her pleadings and by the facts confined to the provisions of the sub-section if she is to succeed in her action.

In order to understand that proviso I will refer quite shortly to the sections of the Act which lead up to it. Sect. 1 provides that copyright shall subsist for the term thereinafter mentioned in every original literary work if (*a*), in the case of a published work, the work was first published within such parts of His Majesty's dominions to which the Act extends, and (*b*), in the case of an unpublished work, the author at the date of the making of the work was a British subject. Then sub-s. 2 of s. 1 defines what is meant for the purposes of the Act by the word "copyright." I can pass over s. 2, which explains what is meant by infringement of copyright; it states the circumstances in which a work shall be deemed to be infringed. Sect. 3 deals with the term for which copyright is to subsist under the Act. I can pass over s. 4 and turn to s. 5, which states who is to be the owner of the copyright in various cases. The general provision is that the author of the work shall be the first owner of the copyright therein. Then there are two provisos, to which I have already referred, which enact that in certain circumstances the copyright shall not be vested in the author but in somebody else. Sub-s. 2 provides that the owner may assign his copyright. Then comes s. 6, which deals with remedies for infringement of the copyright. Sub-s. 1 says: " Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction . . . . as are or may be conferred by law for the infringement of a right."

Pausing there, the owner of a copyright under the Act who complains that it has been infringed has to prove two things in order to succeed in any action that he may bring: first, that copyright exists in the work in question; and, secondly, that he is the owner of the copyright, which he can prove either by showing that he himself is the author or that the work was executed in one of the ways mentioned in the provisos to s. 5, or that he is the assignee of the author or other true owner of the copyright. All that in many cases might be expensive, and if there was no real issue about it unnecessary expense would be involved in proving those things. Then comes sub-s. 3, which, in my opinion, is merely a sub-section dealing with procedure in any such action as is contemplated in sub-s. 1—that is to say, an action brought for the purpose of restraining infringement and recovering damages and so on in respect of infringement of copyright. It provides: " In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff. . . . ." Where therefore the defendant does not put either of those matters in issue the plaintiff will not have to prove that the work has copyright and he will not have to prove that he is the owner of the copyright; that will be assumed in his favour. Where the title of the plaintiff is put in issue then it is provided as follows: "(*a*) If a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work." So that even where his title is put in issue if he produces a book or pamphlet which contains a print of the literary work and that book or pamphlet contains printed on it a name purporting to be the author of the work, then, unless the contrary is proved, the person whose name is so printed shall be presumed to be the author of the work. I take it, therefore, that if he is the person whose name is printed on the book and the book or pamphlet is put in, it will be proved that he is in fact the author of the work. Clause (*b*), which is the important one here, deals with the case where no name is so printed or indicated or where the name so printed or indicated is not the author's true name or the name by which he is commonly known, and then it provides that if "a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein."

It will be observed that the sub-section in no way purports to divest the author or other true owner of the copyright of his rights. Nor is it confined to the case of an author whose whereabouts cannot be ascertained. Such a case is not, indeed, in terms mentioned in the section. What it does contemplate is that there is an author whose name is well known to the publisher but who for reasons of his own does not desire his name to appear on the published work, who desires to remain anonymous or who has published the work under a nom de plume. In that case the person whose name is printed on the work as publisher is to be presumed for the purposes of the proceedings, and only for those purposes, to be the owner of the copyright. The words " for the purposes of proceedings " mean, in my opinion, for the purposes of proceedings which are contemplated by the sub-section itself—the sub-section which begins, as I have already pointed out, with the words " In any action for infringement of copyright." I think that this is the reason why such a provision is to be found in the Act. It would be very hard on an author who wished his name to be concealed from the public if he was not able to prevent piracy of his work except at the cost and risk of having his connection with the work made public, and, therefore, there is put into the hands of the publishers, in those circumstances, a right to sue, and to sue, as I understand it, on behalf of the real owner of the copyright, whose rights, as I have already stated, are in no way divested by the sub-section. Then there are the words " unless the contrary is proved." The contrary can be proved by the defendant if he is in a position to prove it by showing that some particular person other than the publisher is the true owner of the copyright. I do not think the contrary would be proved by showing merely that the publisher was not the owner of the copyright, because the whole sub-section, as I read it, is based on the hypothesis that the publisher is not the owner of the copyright but for the purposes of the proceedings in question is deemed to be the owner of the copyright.

If that is, as I think it is, the true construction of the sub-section, and it is the construction which Clauson J. has put on it, what, then, is the position of the plaintiff in so far as she relies on the book produced by her published in the year 1896? On it there appear the words " Printed for A. Lewis." I am prepared to assume, as the Master of the Rolls has assumed, that those words sufficiently indicate that A. Lewis was the publisher of the work in 1896. Who was A. Lewis? It certainly was not the plaintiff. There is no proof that it was John Hogg in 1896, but I am willing to assume that John Hogg was carrying on business as a publisher in that year under the name of A. Lewis. It will not help the plaintiff, however, for the Court to presume that John Hogg was the owner of the copyright for the purposes of these proceedings. So far, therefore, as the plaintiff founds herself on the book of 1896 I am entirely in agreement with what Clauson J. has said and what has been said by the Master of the Rolls. Where my doubt arises is when the plaintiff relies not on the 1896 edition but on that of 1929. It is quite plain, I think, that in the sub-section the words "the work" do not mean the same as the words "the work" in s. 1, for instance, of the Act. "The work" in which copyright exists is the expression of his ideas on the part of the author. That is plain from the fact that copyright exists in published and unpublished works. An author who expresses his ideas in a manuscript which he keeps to himself has copyright in that work—that is to say, in the expression of his ideas in the manuscript—and when he subsequently causes it to be published he does not obtain a new copyright; his copyright still is the same as before, though the expression of his ideas is now to be found not only in the manuscript but in a printed book or a printed pamphlet. Sect. 6, sub-s. 3 (*b*), however, by the words "the work" is referring to something on which the name of the author can be printed or indicated or the name of the publisher can be printed or indicated. That must mean a book or pamphlet in which is printed the expression of ideas for the composition of which the author is entitled to copyright. Supposing an author, desiring to remain anonymous, causes his work to be published in the year 1920 by a firm, say, A.B. While A.B. is existing, if any one commits infringement of the author's copyright in the work, an action can be brought in the name of A.B., the edition published by A.B. will be produced, the sub-section will come into operation, and for the purposes of those proceedings A.B. will be deemed to be the owner of the copyright. But supposing A.B. ceases to exist, the author of the work, still desiring to remain anonymous and to be able to protect his work if necessary, causes it to be published now by C.D. Why should not the proviso operate in favour of C.D. when an action is brought by C.D. on behalf of the anonymous author? I cannot see for myself why it should not. I should have thought that the work—that is to say, the printed document on which the publisher's name appears—is a publication of the work in which copyright exists, and none the less that the second edition does not contain any new matter so as to constitute the composition which is published in the second edition a new composition conferring a new copyright upon the author.

If, therefore, the plaintiff in this case had confined herself to suing in respect of the 1929 book—that is to say, had confined herself to proving her right to the copyright in the composition by producing the print of the composition which was issued in the year 1929 and which contains her name or, rather, the name under which she was trading as the publisher—I should have thought, speaking entirely for myself, that the sub-section would have operated in her favour. Unfortunately that is not what the plaintiff did. She put forward to the Court at least three books, copies of the composition in which copyright is claimed; she put forward one published in 1896, another in 1917, and a third in 1929. The first one I assume shows that John Hogg was the publisher. Therefore the Court presumes that John Hogg is the person entitled to the copyright in the composition. Then, looking at 1920, the Court finds another—A. Lewis, that is the pseudonym of Godfrey James Hogg. It must be presumed that Godfrey James Hogg for the purposes of these procceedings is the owner of that copyright. Then, with regard to 1929, the Court has to make a third presumption, apparently that the present plaintiff is the owner of the copyright. In these circumstances I do not see myself how the Court can possibly choose between the three presumptions, all of which are put in question by the action of the plaintiff, and that being so I am not prepared to differ from the decision of Clauson J., which has received the approval of the Master of the Rolls.

MAUGHAM L.J. I am of the same opinion, and having regard to what my brethren have said in reference to the facts, I shall confine myself to certain observations on the rather difficult section which we have to construe—namely, s. 6 of the Copyright Act, 1911. Apart from the actual language in which it is expressed I think one may say with confidence that the whole section, or nearly all of it, is intended to give effect to Article 11 of the Berne Convention of 1886, substantially reproduced in Article 15 of the Berlin Convention of 1908. Under our own law there was great difficulty in protecting in any way productions of an anonymous or pseudonymous character; but as early as the first Berne Convention, to which of course this country was a party, it was agreed in Article 11 as follows: "For anonymous or pseudonymous works the publisher whose name is indicated on the work shall be entitled to protect the rights belonging to the author. He shall be, without other proof, deemed to be the legal representative of the anonymous or pseudonymous author." That such conventions can be referred to for the purpose of construing the Act appears, I think, from a judgment of Cockburn C.J. in *Reg.* v. *Wilson.* (1) Having regard to that fact and to the language of the section, I think it is manifest that s. 6, sub-s. 3 (*b*), was intended to enable the publisher to protect the rights of the anonymous or pseudonymous author without giving his true name away. It is a section designed not for the benefit of publishers in any sense, and, in my opinion, if a publisher relying on such a presumption brings an action and recovers damages he recovers them on behalf of the author if the author has remained the owner of the copyright. It deals merely with procedure—the procedure in an action for infringement. It is a mistake to suppose that it transfers any legal rights to the publisher, or that as soon as the action is over, and I may add before the action is begun, there is any presumption of law whatever.

In my opinion, it follows that, the presumption being one only for the purposes of proceedings for infringement, there is no ground for presuming under the section that some publisher who published a work long ago, but who is now dead and who never was concerned in an infringement action,

(1) (1877) 3 Q. B. D. 42, 45.

was the owner of the copyright in the work. The presumption does not apply to him, because it can only apply for the purposes of an infringement action with which that deceased publisher was never concerned. The difficulty in giving the wide construction to the sub-section for which Mr. Schiller contends does not rest, I think, simply on the use of the tense in the sentence "whose name is so printed . . . . shall . . . . be presumed to be the owner of the copyright," but is also to be gathered from the words "presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement." Accordingly, in my view, it is wrong to suppose that any presumption can be made with regard to ownership of a past publisher, since he cannot be presumed "to be" the owner for the purposes of these infringement proceedings. As Clauson J. observed, it may seem a narrow interpretation of the section. But we are not entitled, as it seems to me, in a section relating to proof of certain evidential facts in an infringement action to go beyond the language of the section, and I do not think it is very surprising that a section introduced for the purpose of giving effect to the rights of anonymous authors was not framed so as to apply long after the anonymous author is dead or the original publisher is dead.

Accordingly, in my opinion, the judgment of the judge on this point was perfectly right. I would only observe this, that there are a number of other difficulties in putting on the sub-section the construction for which Mr. Schiller contends. One is the difficulty already pointed out—of making the sub-section apply to a copyright originally gained under the Act of 1842 or, indeed, under any preceding Act, since "copyright" in the Act of 1911 has a different meaning from that which it originally possessed and such copyright enures for a different term.

There is another matter on which I must also say a word and that is with reference to the point which Mr. Macgillivray took, that the plaintiff was entitled to bring into Court the edition of, say, 1931, and to point to that document or little book as containing the name of the publisher of the work printed thereon in the usual manner and to ask the Court thereupon to presume that the person whose name was so printed—namely, the plaintiff—was to be presumed to be the owner of the copyright in the work. If the work of 1931 had been the subject of a new copyright and capable of a new copyright, in my opinion that contention would have succeeded; but where I am unable to follow it is that I find there was no copyright properly so called in the editions of 1926, 1929 and 1931. The position with regard to reprints has not, I think, altered since the Act of 1911 was passed. An edition which contains no substantial alteration and therefore is a mere reprint in substance of an old edition was not entitled under the old law to any copyright whatsoever so far as that edition was concerned. As was observed in the Scotch case of *Black* v. *Murray & Son* (1) by the Lord President: " A new edition of a book may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of the new edition." In my opinion, under the Act of 1842 the publisher of the reprint had no copyright whatever. The author who without any act of authorship authorized the reprinting of a work did not gain any copyright in it, and, in my opinion, under the present Act the position is the same. The owner of an original copyright in general does not say anything about later editions; if he proves that he published a work at a particular date he gets a copyright in that literary work under s. 1 of the Copyright Act, 1911, and he gets no further right whatsoever if the work is reprinted from time to time.

I see a serious objection to thinking that a mere reprint ought to be entitled to the benefit of cl. (*b*), because the reprint might be a reprint purely ad hoc for the purposes of the action by some not very reputable person who might say, having put in a document of this kind: " Although it is a reprint and the work was published forty years ago, here it is and my name being on the document I am to be deemed, unless the contrary is proved, to be the owner of the copyright."

In my opinion, there being no originality in the reprint, and no copyright being obtained under s. 1 in a literary work,

(1) (1870) 9 R. 341, 343.

unless it is an original literary work, the plaintiff in the present case would have gained no advantage by putting in the last two or three editions and claiming to protect those. I would only add this, that if the plaintiff had come into Court with a reprint alone and not, as Romer L.J. has pointed out, with a number of editions, she could not, in my opinion, have been presumed to be the owner of the copyright, since upon the production of the previous original edition it would be established that she was not the owner of the copyright in the reprint because one cannot become the owner of a copyright merely by copying somebody else's work.

It follows, in my opinion, that the plaintiff is unable to rely on the reprints and that accordingly she is not entitled to take advantage of s. 6, sub-s. 3 (*b*), of the Act. In other respects she fails to establish her title to the copyright in question for the reasons given by my brethren, to which I find that I can add nothing useful. I agree therefore that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors for appellant: *Perowne & Co.*
Solicitors for respondents: *T. J. Robinson & Son.*

W. I. C.

EVE J.

1935

April 11.

In re EIGHMIE.

COLBOURNE *v.* WILKS.

[1927. E. 1495.]

Will—Gift for maintenance of monument, burial ground, and churchyard —Validity—Legacy in foreign currency or equivalent in sterling— Date for ascertaining rate of exchange—Legacy Duty—Claims to payment of duty out of funds in Court—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 53—*Legacy Duty Act,* 1796 (36 *Geo.* 3, *c.* 52), *s.* 25.

A testatrix who died domiciled in England, leaving property in both England and the United States, by her will gave a legacy of 10,000 dollars or the equivalent thereof in sterling at current rates of exchange to the rector and churchwardens or other the governing body of Chiswick Church for the purpose of keeping the burial ground and monument therein to her late husband and herself in good and sufficient repair and for the maintenance of the church and the decorations thereof. The testatrix, who died in 1925 was buried in Chiswick cemetery immediately adjoining the churchyard, which had long been closed for burials, in the same grave as her husband :—

Held, a valid charitable bequest, to be divided equally between the vicar and churchwardens of Chiswick Parish Church as the controllers of the church and churchyard and the Borough Council as managers and owners of the cemetery.

Held, further, that the value of the legacy and therefore the rate of exchange from dollars into sterling must be ascertained on the first anniversary of the death of the testatrix.

The power of the Court under s. 53 of the Succession Duty Act, 1853, to direct payment out of any fund under the control of the Court in an administration action, of legacy or succession duty, does not enable the duty payable in respect of a bequest, etc., to one person to be deducted from the assets comprised in a bequest, etc., to another person. It only enables duty owing by a legatee to be paid out of any other property to which he is entitled and which is under the control of the Court.

Statement of the law in Halsbury's Laws of England, vol xiii., p. 336, para. 367, adopted and approved.

PETITION.

By her will dated May 15, 1925, Mrs. Margaret Eighmie, widow of George D. Eighmie, an American citizen domiciled in England, who died in 1922, gave several pecuniary legacies expressed in dollar currency free of legacy and estate duty, including one of $10,000, or the equivalent thereof in sterling at current rates of exchange, to the rector and churchwardens or other the governing body of Chiswick Church, Chiswick, London, for the purpose of keeping the burial ground and monument therein to her late husband and herself in good and sufficient repair and for the maintenance of the said church and the decorations thereof and of the said churchyard.

The testatrix gave, devised and bequeathed all her stocks and shares of and in American companies to her trustees therein named in trust to pay the income thereof to Mrs. Constance Price of London during her life and after her death to transfer the same or the net proceeds thereof to the trustees or other the governing body of the Society for the Prevention of Cruelty to Animals in England. She gave all the residue of her estate to her trustees upon trust for conversion and after the payment of debts and funeral expenses and the legacies bequeathed by the second clause of her will to such charitable institution or institutions in the United States of America as her trustees might jointly select.

The testatrix appointed Richard Wilks and Nelson William Ewart Colbourne (both of London) as to English assets and Henry D. Holden (of New York) as to American assets executors and trustees of her will, and provided for the alternative possibilities of her will being proved first in England and afterwards in the United States, and vice versa.

The testatrix died in London, domiciled in England, on May 16, 1925, and her will was proved in the Probate Registry on November 16, 1925, by her English executors, and on February 5, 1926, by her American executor, who subsequently proved it in the State of New York on April 26, 1926. After the death of the testatrix her funeral expenses and debts and a sum in respect of estate duty, and certain sums on account of pecuniary legacies bequeathed by her will, were paid out of her English estate.

On November 18, 1927, the present action was commenced by the petitioner N. W. E. Colbourne for the administration of the estate of the testatrix. At that date the other English executor, Richard Wilks, was unable, owing to ill-health, to attend to any business, and he died on March 19, 1928. The usual accounts and inquiries were directed, and a sum of 12,100*l.* was paid into Court to the credit of the action on October 28, 1930. In 1932 the petitioner received from H. D. Holden, the American executor, a sum in dollars which on conversion into sterling realized 4711*l.*, representing moneys paid by the English executors to pecuniary legatees in the United States. As against the moneys in Court and in the hands of the petitioner, claims had been made in respect of estate and legacy duty which had not been satisfied. In particular questions were raised on this petition whether the bequest of 10,000 dollars to the rector and churchwardens of Chiswick was valid, and at what date the rate of exchange into sterling ought to be ascertained, and as to the liability of the moneys in Court to legacy duty on the settled legacy of American shares in favour of Mrs. Price. After negotiations the Commissioners of Inland Revenue in 1931 made an amended assessment of 3332*l.* for legacy duty on this legacy, which consisted entirely of shares in an American company, the Title Guarantee & Trust Company. This assessment was not accepted by the American executor, who refused to apply to the Surrogate's Court of New York for leave to sell the shares. Ultimately the Estate Duty Office intimated to the petitioner that they would accept 2000*l.* in settlement of the legacy duty on certain conditions.

In March, 1934, the value of the shares comprising the legacy had fallen to such an extent that it was much less than the amount of the duty assessed against the legacy, and in the circumstances the American executor was unwilling to sell any of the shares in order to raise the duty, or to submit to the assessment. The value of the 100 dollar shares in this company in February, 1935, was only from 4 to 5 dollars, and they were practically unsaleable.

Since the death of the testatrix a considerable amount of income arising from this legacy had been paid by the executors to Mrs. Price, but no legacy duty had been paid.

The Crown was not represented on the hearing of the petition.

The petition asked (inter alia) (1.) whether the legacy of 10,000 dollars to the rector and churchwardens of Chiswick Church was valid, or whether part thereof was payable to the Brentford and Chiswick Borough Council; (2.) whether this legacy and a legacy of 25,000 dollars payable to the late Richard Wilks ought to be satisfied by the payment of sums of the equivalent value in sterling calculated at the rate of exchange existing (*a*) on the date of the death of the testatrix, or (*b*) at the expiration of one year after the death of the testatrix, or (*c*) at the date when payments of such respective legacies were actually made; (3.) that directions might be given for the payment out of the funds in Court and to be lodged in Court by the petitioner of various sums, including the sum of 2000*l.* agreed to be accepted as a composition in respect of the duty on the legacy of the American investments bequeathed by the third clause of the testatrix's will and interest thereon, or other the amount of the legacy duty payable in respect of such investments and the interest thereon.

Norman Daynes K.C. and *R. M. Pattisson* for the petitioner.

E. W. Lavington for the beneficiaries entitled to the settled legacy.

Overton for the executors of Richard Wilks.

H. Lloyd Williams for the Brentford and Chiswick Borough Council.

G. P. Slade for the vicar and churchwardens of Chiswick.

Hon. Charles Russell for the residuary legatees.

[The following cases were referred to: *In re Manser. Att.-Gen.* v. *Lucas* (1); *Hoare* v. *Osborne* (2); *In re Vaughan. Vaughan* v. *Thomas* (3); *In re Hall's Charity.* (4)]

EVE J. The burial grounds in the immediate vicinity of Chiswick Church are two in number, the one the churchyard, which was closed for burials about thirty years ago, and the other the cemetery, consecrated and opened many years ago as a public burial ground wherein the bodies of the husband

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(1) [1905] 1 Ch. 68.
(2) (1866) L. R. 1 Eq. 585.
(3) (1886) 33 Ch. D. 187.
(4) (1851) 14 Beav. 115.

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of the testatrix and the testatrix herself were buried in 1923 and 1925 respectively. The testatrix in terms includes both in her will, identifying the one as the burial ground wherein is the monument to her husband and the other by its proper name, the churchyard. Is this a good charitable gift? I think it is. The money is given for the purpose of keeping the burial ground and the church and churchyard in good and sufficient repair, and this incidentally involves the maintenance of the monuments and other decorations of the church, the burial ground and the churchyard. I think the fund falls to be divided equally between the vicar and churchwardens as the controllers of the church and churchyard, and the Brentford and Chiswick Borough Council, in which are vested the management and ownership of the cemetery.

The remaining questions were then argued on behalf of the parties interested.

Overton. The rate of exchange at the time of the testatrix's death, and also one year afterwards, was $4.86 to the pound, at present it stands at $4.83, so that there is only a difference of three cents in the pound. I submit that the proper rate of exchange applicable is that prevailing when the legacy is paid, i.e., the present time. The principle applicable is that decided in *In re Chesterman's Trusts.* (1) In that case there was a fund in Court to the credit of an administration action, and the Master certified that moneys were due thereout in respect of mortgages payable to a Dutch bank in German marks. Russell J. and the Court of Appeal (Younger L.J. dissenting) held that the date for ascertaining the rate of exchange was not that when the mortgage debt became due, but the date of the Master's certificate.

The point was discussed, but not decided, in *Cockerell* v. *Barber* (2), where payment was ordered at the current value of the rupee in India, without regard to the exchange. The record of this case has been examined, but even so it is difficult to understand. See also *Campbell* v. *Graham* (1) and *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (2); and Roper on Legacies at p. 862 (sect 2, para. 3).

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(1) [1923] 2 Ch. 466.

(2) (1810) 16 Ves. 461.

G. P. Slade adopted this argument.

Hon. Charles Russell. These legacies must be treated just like any other general legacy such as a legacy of stocks or shares, and the value must be determined as at the date when it becomes due, i.e., at one year from the death of the testatrix. Otherwise it would be impossible to value the interest accurately.

EVE J. In my opinion Mr. Russell's contention is correct. Equality between these legatees can be brought about only by fixing one and the same date for ascertaining the amount or value of each of their several legacies. The proper date is the first anniversary of the death of the testatrix: Roper on Legacies, 4th ed., p. 862.

Norman Daynes K.C. and *Pattisson* for petitioner (on the question of the incidence of legacy duty). Where a foreign executor has failed to pay legacy duty on a legacy of foreign assets given by the will of a testatrix domiciled in England, the Court here can protect our Revenue by paying the duty out of the English assets in its possession and control in an administration action. That is the result of s. 53 of the Succession Duty Act, 1853. (3) Sect. 25 of the Legacy Duty Act, 1796 (4), is limited by the words "in giving directions concerning the same." It only enables the Court to provide for legacy duty in giving directions concerning the legacy. The Court could direct payment of duty out of the legacy or withhold payment of the legacy until duty should be paid. There is no point in adding s. 53 unless it goes beyond that. That it does go beyond s. 25 appears from *In re Harding. Public Trustee* v. *Wohlwill.* (1) It is true that in that case the assets out of which duty was ordered to be paid were assets to which the legatee was entitled. It was not necessary there to consider whether the duty could be ordered to be paid out of other assets to which the legatee was not entitled. It is submitted that it could.

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(1) (1831) 1 Russ. & My. 453, 472; sub.-nom. *Campbell* v. *Sandford*; (1834) 2 Cl. & Fin. 429.

(2) [1924] 2 Ch. 451, 471.

(3) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 53: "Whenever any suit shall be pending in any court for the administration of any property chargeable with duty under this Act or the Legacy Duty Acts, such court shall provide, out of any property which may be in the possession or control of the court, for the payment of duty to the commissioners."

(4) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 25: "If any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate, in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such

Sect. 53 is quite general in its terms and means what it says. Its effect is correctly stated in Williams on Executors, 12th ed., p. 966. The Legislature, if so advised, could have restricted it to assets to which the legatee was entitled. It did not do so. If the Court takes residue for payment of duty on a settled legacy in the first instance, that would not prevent the burden of the duty ultimately falling on the proper person. The principle is that the person who bears the duty in the first instance is given the rights of a surety against the person upon whom the burden of the duty ought to fall: see *Hales* v. *Freeman.* (2) The object of s. 53 is to help the Court to enforce the rule that a legacy of foreign assets given by a person domiciled here attracts legacy duty.

Lavington submitted that *In re Harding* (1) was distinguishable on the facts.

Hon. Charles Russell. There is no charge for legacy duty on any property other than the legacy itself, and no liability known to the law on residue for legacy duty.

suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate or otherwise acting concerning the same, such court shall take care that no allowance shall be made in respect of any legacy or part of legacy or of any residue or part of residue in any manner whatsoever, without due proof of the payment of the duties hereby imposed."

(1) (1922) 66th Report of Commissioners of Inland Revenue, p. 16.

(2) (1819) 1 Brod. & B. 391.

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The executor and the legatee are both liable to the Crown for the duty, but not the residuary legatee, under any possible interpretation of the Succession Duty Act, 1853, s. 53. (1) The legatee may, however, be forced to provide for the duty out of any other property which he has received, because he is a debtor to the Crown: *In re Harding* (2); Halsbury's Laws of England, vol. xiii., p. 367.

G. P. Slade. It is not in the least clear that any legacy will be paid in full. There is no jurisdiction under s. 53 to order payment of legacy duty out of a fund which is not liable to that duty. Sect.53 must be read as referring only to payment of duty out of a fund which is liable to bear duty: see Hanson on Death Duties, pp. 373 and 560. The executor cannot claim to deduct, any more than the Crown can claim to receive, the duty in respect of a legacy or share of residue belonging to one person out of the legacy or share belonging to another: *Wright* v. *Barnewall* (3); *Hicks* v. *Keat* (4); unless so read the section might have far-reaching and absurd results. The Crown must be left to such remedies for the recovery of legacy duty as it may choose to exercise.

Norman Daynes K.C. in reply. The suggested limitation of s. 53 would make it idle and superfluous. Long before 1853 the Court had power in an administration action to direct payment out of any assets under its control of duty properly payable thereout. In order to secure payment of duty the Court (like an executor) has plenum dominium over the assets under its control: but that does not prejudice the rights of the beneficiaries inter se.

EVE J. The closely reasoned argument which has been advanced on behalf of the residue is in my opinion unanswerable. It leads to a result which is summarized in para. 367 on p. 336 of Halsbury's Laws of England, vol. xiii., 2nd ed., and is in these terms:—

"The legacy duty payable in respect of a bequest, etc., to one person cannot be deducted from the assets comprised in a bequest, etc., to another person. Even where separate legacies under a will are bequeathed to the same legatee, there is no lien upon one legacy for the duty on the other legacy; and the same rule holds as between an assignor and assignee, with regard to separate parts of one and the same legacy. As against the legatee personally, however, unpaid duty for which he is a Crown debtor may be ordered to be paid out of any other property to which he is entitled and which is under the control of the Court."

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(1) See note (3), ante, p. 529.

(2) (1922) 66th Report of Commissioners of Inland Revenue p. 16.

(3) (1849) 13 Jur. 1041; 19 L. J. (Ch.) 38.

(4) (1840) 3 Beav. 141.

That expresses, I think, accurately the effect of the decision in *In re Harding. Public Trustee* v. *Wohlwill.* (1)

This section of the Succession Duty Act, 1853, is capable of two different interpretations: (1.) that the property under the control of the Court may be made liable for any legacy duty due and unpaid in the course of the same administration; and (2.) that it gives a right to resort to some other property of the same legatee under the control of the Court.

I cannot impose on the section the very wide interpretation which the petitioner asks me to adopt, and I hold that the second of these two interpretations is the true one.

Solicitors: *Warren, Murton, Foster & Swan; Park Nelson & Co.; Gregory, Rowcliffe & Co.; Trotter, Leaf & Pitcairn; John Skinner, Town Clerk, Chiswick.*

(1) (1922) 66th Report of Commissioners of Inland Revenue, p. 16.

H. L. L.

In re SPENCER.

LLOYDS BANK LIMITED *v.* SPENCER.

CLAUSON J.

1934 Oct. 24.

[1934. S. 2068.]

Will—Construction—Administration—Trust to accumulate Income of share of child whilst under thirty—Trust to pay child share of Residue on attaining thirty-five—Statutory Direction to pay income of property to beneficiary whose interest is not vested at twenty-one—Contingent Interest in Property not Carrying Intermediate Income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31; *s.* 69, *sub-s.* 2.

A testator who died on June 12, 1931, by his will gave his residuary estate upon trust, as to two-thirds thereof to his son John, and settled that share upon trust during the life of his said son upon the protective trusts contained in s. 33 of the Trustee Act, 1925, and after the son's death upon trust for the son's children and in default of children for the testator's daughter Mrs. P. and her children, save and except that (*a*) whilst the son should be living and under the age of thirty years, the trustees should accumulate the income of the son's share in augmentation and so as to follow the destination of the capital of his share, and (*b*) if the son should attain the age of thirty-five years and no act or event should have been done or happened whereby his share would, if subject to an absolute trust for payment thereof to him, have become vested or charged in favour of some other person, the trustees should pay one half of the share of the son to him for his own absolute use and benefit.

The son John, who was born on July 6, 1905, at the date of the testator's death had attained twenty-one and would not attain the age of thirty-five until July 6, 1940. In pursuance of the directions in the will, the trustees accumulated and invested the income of the son's settled share.

The question was whether, having regard to s. 31 of the Trustee Act, 1925, the son was entitled to be paid the income arisen and to arise between the death of the testator and the son's attainment of the age of thirty years in respect of the moiety of his settled share in the residuary estate of the testator, until the happening of any event which would defeat his contingent right to a transfer of that moiety upon his attaining the age of thirty-five years, or whether the said income must be accumulated until such moiety should become transferable to him:—

Held, that s. 31, sub-s. 1, cl. ii. of the Trustee Act, 1925, which imposed upon the trustees of the moiety of the son's settled share, to the income of which he was only contingently entitled on attaining the age of thirty-five years, a trust to pay to him the income thereof until the happening of either of the events in the clause mentioned, did not apply, because, owing to the possibility of a forfeiture of the said income under the protective trusts in the will, the trust did not carry the intermediate income in accordance with the requirements of sub-s. 3 of s. 31.

But for sub-s. 3, notwithstanding s. 69 of the Act (which is concerned only with powers conferred by the Act), the imperative direction in cl. ii. to pay the income to the son would override the trust to accumulate the income contained in the will, which is inconsistent with the application of cl. ii.

Whether the interest of the son's sister Mrs. P. and her children under the trust to accumulate the income could be treated as a "prior interest affecting the property," i.e., the moiety of the son's share, within the meaning of s. 31, sub-s. 1, *quaere*.

ADJOURNED SUMMONS.

Edwin John Spencer having made his will dated September 9, 1930, whereby he appointed the plaintiffs to be the executor and trustee thereof, died on June 12, 1931. At the date of his will the testator had a son, the defendant John Ogilvie Spencer, and a married daughter, the defendant Margaret Ogilvie Pelly.

The following statement of the other material facts is taken from the judgment of Clauson J. :—

"The material provisions of the will are as follows: 'I bequeath to my trustees for the benefit of each child of mine who shall survive me a legacy of 25,000*l.* (which legacy or the investments for the time being representing the same is hereinafter referred to as "the settled legacy of such child") with interest thereon payable out of the income of my estate at the rate of 4 per cent. per annum as from my death until the same legacy shall have been paid or appropriated. And I direct that my trustees shall invest the settled legacy of such child of mine in any manner hereinafter authorised with power to vary investments and shall stand possessed thereof upon the trusts hereinafter declared concerning the same.' It is necessary to go through these trusts in some detail, because it is by reference to the trusts of his settled legacy that the share of the son in the residuary estate, the income of whose share is now in question, is settled. The trusts are '(*a*) during the life of such child my trustees shall hold the income of such settled legacy (other than income for the time being subject to a restraint on anticipation) on protective trusts.' By the expression 'protective trusts' the testator is referring to the provisions of s. 33 of the Trustee Act, 1925, and I need refer to them only for the purpose of pointing out that those trusts involve taking the income away from the person whom I may call the primary beneficiary in any case in which an event happens which would deprive that beneficiary of the right to receive the income or any part of it. Then, 'from and after the death of such child the trustees are to stand possessed of such settled legacy in trust for the children of such child, subject to any appointment made by such child in favour of any of his or her children.' I need not refer to those trusts in greater detail.

Then this provision follows: 'If the trusts hereinbefore declared concerning the settled legacy of such child of mine shall fail or determine then subject to the trusts powers and provisions herein declared and contained and to the powers by law vested in my trustees concerning the same and every or any exercise of such respective powers such settled legacy shall go and accrue by way of addition to the settled legacy of my other child and shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning such last mentioned settled legacy or as near thereto as circumstances will admit.'

I can now go straight on to the clause which declares the trusts of the residuary estate. There are the usual residuary devises and bequests, and clause 11 is in these terms and requires careful attention: 'My trustees shall stand possessed of the trust premises constituting or representing my residuary estate (which and the property for the time being representing the same are hereinafter called "the residuary trust fund") and the income thereof in trust for such of them my son John Ogilvie Spencer and my daughter Margaret Ogilvie Pelly as shall survive me and if both survive me' (the event which happened) 'then in the proportions of two-thirds to my said son and one-third to my said daughter. Provided always and I declare that the share of the residuary fund which is hereinbefore expressed to be given to each child of mine shall not vest absolutely in such child but shall be retained by my

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trustees and held by them upon the same trusts and with and subject to the same powers and provisions as are hereinbefore declared and contained of and concerning the settled legacy of such child Save and Except that (*a*) whilst such child of mine shall be living and under the age of thirty years my trustees shall accumulate the income of the share of such child in the residuary fund at compound interest by investing the same and the resulting income thereof in any investments hereby authorised in augmentation and so as to follow the destination of the capital of the share from which the same income shall have proceeded and (*b*) If my son shall attain the age of thirty-five years and no act or event shall have been done or happened (other than any exercise of any power vested in my trustees) whereby his share in the residuary fund would if subject to an absolute trust for payment thereof to him have become vested in or charged in favour of some other person or persons or some corporation then and in that case my trustees shall pay and transfer one half of the share of my son in the residuary fund to my son for his own absolute use and benefit."

The son had attained the age of twenty-one years when the testator died, but he has not yet attained the age of thirty-five years. It will be observed that the effect of this clause is that, as to one half of the son's two-thirds of the residue, instead of being settled on the son and his children or in default of children on the daughter and her children, it is settled in quite a different way. The son is to have it contingently on his attaining the age of thirty-five years ; if he does not attain that age, then, apparently, the fund will be settled on him and his children or, if he has no children, it will be settled on his sister and her children. At present he may or may not attain the age of thirty-five years ; in other words, his interest in the fund is contingent.

I am asked by the summons to give directions in relation to the income arisen and arising between the death of the testator and the attainment by the defendant John Ogilvie Spencer of the age of thirty years from the moiety of his settled share in the testator's residuary estate which is by the will directed to be transferred to him upon his attaining the age of thirty-five years, subject to the contingency in the will mentioned: and the question I am asked to solve is whether such income should be accumulated by the plaintiffs and retained until such moiety shall become transferable to the son or whether, having regard to the provisions of cl. ii. of sub-s. 1 of s. 31 of the Trustee Act, 1925, such income was and is immediately payable to the son until the happening of any event which would defeat the contingent right of the son to a transfer of the said moiety upon attaining his age of thirty-five years."

D. Llewelyn Jenkins for the plaintiffs, the trustees, who in pursuance of the directions in the will, had accumulated and invested the income of the son's settled share in the residuary estate of the testator.

Vaisey K.C. and *C. E. Shebbeare* for the defendant John Ogilvie Spencer. Sect. 31 of the Trustee Act, 1925 (1) applies to the present case. The son " has not a vested interest " in the income, as his interest is contingent upon his attaining the age of thirty-five years. Sub-s. 1, cl. ii., overrides the trust to accumulate the income contained in the will: cl. ii. contains an imperative direction to the trustees to pay the income to the son; the words used being " shall thenceforth pay the income." The clause is imperative. Sect. 69 of the Act is concerned only with powers conferred by the Act and has no effect upon cl. ii.: no question therefore can arise whether an intention to accumulate income contrary to the trust in cl. ii. is expressed in the will. If the section does not apply here, it seems difficult to mention a case to which it can apply. The interests

(1) Sect. 31 of Trustee Act, 1925, sub-s. 1: " Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property — . . . .

(ii.) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:"

Sub-s. 3: " This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property. . . . ."

of the daughter, Mrs. Pelly, and her children are not "prior interests . . . . affecting that property" within the meaning of sub-s. 1 of s. 31. They are future interests, because they only take effect if the trusts declared concerning the share of the son should fail or determine. The income is directed to be accumulated until the child of the testator should attain the age of thirty years, so as to follow the destination of the capital of the share from which the income had proceeded: in the case of the daughter, the trust to accumulate holds good; her interest being an interest for her life only, her share cannot, in face of the trust to accumulate the income, carry the intermediate income, a condition imposed by sub-s. 3 upon which the application of s. 31 depends: *In re Reade-Revell.* (1)

But in the case of the son it is otherwise: the trust of the moiety of his two-thirds is for his absolute benefit upon his attaining the age of thirty-five years and carries the intermediate income: and, accordingly, cl. ii. applies and entitles him to be paid the income accruing during the period between the death of the testator and his attainment of the age of thirty.

J. H. Stamp for the defendants Mrs. Margaret Ogilvie Pelly and her two infant children. The direction to the trustees to pay the income to the son contained in cl. ii. only applies if the trust carries the intermediate income: see sub-s. 3 of s. 31. Having regard to the fact that the trust to pay the income of the son's share to him during his life is upon the "protective trusts" referred to in s. 33 of the Trustee Act, 1925, and to the fact that the absolute gift to the son of the moiety of his share contingent upon his attaining the age of thirty-five years is to take effect only if no act or event should have been done or happened whereby his share would, if subject to an absolute trust for payment thereof to him, become vested in or charged in favour of some other person, and having regard to the possibility that under either of those protective trusts the income may become payable to some person other than the son, it cannot be predicated of the

(1) [1930] 1 Ch. 52.

trust for the son of his share that it does necessarily carry the whole of the intermediate income thereof. It must follow, therefrom, that effect must be given to the trust declared under (*a*) of cl. ii of the will for the accumulation of the income of his share in the residuary estate, and the trustees of the will must continue to accumulate the income in accordance with those trusts.

Clauson J. [stated the material provisions of the will and the material facts as set out above and continued :] Before turning to the Act, and apart from the Act, the directions in the will seem to me to be reasonably plain ; they are that this income arising between the time when the testator died and the time when his son attains the age of thirty years is to be accumulated and follow the destination of the capital, so that the income as it accrues is capitalized.

Sect. 31 of the Trustee Act, 1925, is aimed primarily at giving trustees a discretionary power of applying for the benefit of an infant income which in some cases, at all events, is not his, but contingently may become somebody else's ; and, accordingly, the section has the effect of enlarging to that extent much earlier statutory provisions of enabling income to be applied for an infant's benefit, although, apart from the statute, the income would not necessarily be his. I am putting it in somewhat general terms ; but that may be said, I think, to be one of the points to which the section is directed. Previous statutory provisions had confined themselves to dealing with the income of infants, but it is clear, upon a perusal of the section, that the draftsman was aiming at something more, at dealing with the not uncommon case where a beneficiary is put under a restriction, which is sometimes conveniently referred to as deferring the date of his enjoyment, in other words, instead of his becoming entitled to the property at twenty-one, his absolute right is deferred until he attains twenty-five or thirty ; in this case it is thirty-five. In cases of that kind, after the expiration of infancy, as is well known to every practitioner, difficulties had arisen with regard to the maintenance of a person who had attained twenty-one and had therefore ceased to be an infant and yet had not attained a vested interest, and this section is aimed at extending the previous statutory provisions so as to deal in some shape or form with that case, and the case is dealt with by cl. ii of sub-s. 1 of s. 31. That clause is in these terms: "If such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under sub-s. 2 of this section to him, until he either attains a vested interest therein or dies or until failure of his interest." There is rather a remarkable feature about that clause. I think I am right in saying that the clauses of this section which deal with the property of infants are so framed as to confer powers upon trustees which they may or may not exercise. This clause, however, instead of conferring powers, seems, according to its terms, to impose an imperative trust, and to that extent to give income peremptorily and in full right to a person who, but for the section, would not have any right to that income. That of course is a remarkable result.

In s. 69, sub-s. 2, of the Act appears this clause: "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument." If cl. ii. of s. 31, sub-s. 1, dealing with the income of a person who is between the age of twenty-one years and the age when he attained a vested interest in that which is given to him had been expressed in the form of conferring power on the trustees to maintain him out of the income, that clause would, prima facie, having regard to s. 69, sub-s. 2, of the Act, not have been available to override the express terms of the instrument creating the trust, in this case the will; but it seems pretty plain that that sub-section does not apply to this clause. Accordingly, it would seem that this clause in s. 31 has to be applied if the case falls within that section, so as to override anything inconsistent with the application of the clause which is to be found in the trust instrument; and indeed it is said the section does apply and that accordingly cl. ii. in that section has the effect of overriding the provisions of the will that this particular income shall be accumulated and not be paid to the beneficiary—namely, to the son John.

Accordingly, I must be careful to see that it is clear beyond a peradventure that s. 31 does apply to the case before me, because after all it is rather surprising to find that a clause of this kind in a section of this kind should have the effect of overriding the terms of the testator's will. In my view the Legislature in enacting this section has been careful to protect interests other than those of the beneficiary in question. It was essential, if the scheme was to be carried out at all, that the clause should override to some extent the interests of those who would be entitled to the fund, if the contingency on which the beneficiary would become entitled to the fund did not arise, because the whole scheme of the clause would seem to involve taking away, under some circumstances, from those who would be entitled, if the contingency did not arise, income which, but for this section, would be theirs. But the section is framed in this way; it is preceded by the words "subject to any prior interests or charges affecting that property." The point which emerges at once, and upon which I do not think it will be necessary for me to express a concluded opinion, is that it may be said that in this particular case there is a prior interest which has priority over the interest of John, and that interest is the interest of his sister and her children in seeing that the income between the death of the testator and the time when John attains the age of thirty years is accumulated in the way directed by the will. It may be that that is the correct view to take, but there is a grave difficulty in taking that view: take a case in which there is no direction for an accumulation at all in the will, it may well be that in some cases there is an implied direction to accumulate, and the trustees are bound, notwithstanding the absence of a direct provision to that effect in the will or other trust instrument, to accumulate income pending the actual vesting of the gift; but if the right of insisting upon such an accumulation as that (which is made, not under an express provision, but which has to be made in practice in order to preserve the rights of all the parties in the fund) is a prior interest, very considerable difficulty arises as to whether there can be any case in which cl. ii. of sub-s. 1 of s. 31 would be effective. I should certainly hesitate to decide that an accumulation made because of the necessity to preserve rights and not under an express direction in the trust instrument, is an accumulation in which the parties contingently entitled are so interested as to have a prior interest in front of the interest of the primary beneficiary. For that reason, although there is some difference, no doubt, between the case of an accumulation which must take place administratively in order to preserve the rights of the parties and an accumulation under the direct provisions of the will, I do not propose on this occasion to express any concluded opinion as to whether an interest of parties contingently entitled in the making or continuance of an accumulation under a clause of the will can be treated as a prior interest for the purpose of this clause.

The problem in this particular case is, as it seems to me, to be solved upon another ground. Sub-s. 3 of s. 31 says: "This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property." That, as I understand it, means that the section applies in the case of a contingent interest—and here the interest of John is a contingent interest—only if the limitation or trust necessarily carries the whole intermediate income of the property, subject, no doubt, to any disposition of the income made under statutory power or anything of that kind; and in this particular case the problem is capable of solution by reference to this sub-section. Having regard to the peculiar provisions of this will, it appears to me to be impossible to predicate that the trust I have to deal with in this case carries the intermediate income of the property. If there is no forfeiture of the income either under the protective trusts which are to be read into the will by reference to s. 33 of the Act or under the provisions for forfeiture in case before his age of thirty-five an event happens whereby the son's share

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of the residuary fund would, if subject to an absolute trust for payment thereof to him, have become vested in or charged in favour of some other person or persons, no doubt it would be true that the limitation or trust would carry the intermediate income of the property: but there exists the possibility that there may be a forfeiture of the income under the protective trust clauses, a forfeiture which would arise if there was an assignment of the income or part of it, an act which might forfeit the income but would have no operation in forfeiting the capital. Accordingly in that case it would be true to say that the limitation or trust, according to its terms, in the events which happened would not carry the intermediate income of the property; some of the intermediate income would have been taken away by the operation of the forfeiture. In this particular case, that seems to me to be the answer to the problem. In my view in this case with these peculiar limitations, s. 31 has no application to the income which arises between the death of the testator and the attainment by the son John of the age of thirty years. If the section does not apply, then the answer to the problem is easy, the trustees have to accumulate. There will be a declaration that the income in question ought to be accumulated by the plaintiffs in accordance with the terms of the will.

Solicitors: *Pritchard, Sons, Partington & Holland; Hempsons.*

H. C. H.

FARWELL J.

1935 Jan. 17.

In re TEES CONSERVANCY ACT, 1907.

TEES CONSERVANCY COMMISSIONERS *v.* JAMES.

[1934. T. No. 1470.]

Superannuation — Compulsory Pensions Scheme — Contributions — Deductions from wages or salary—No deduction in respect of bonus —Bonus held to be wages or salary—Employers' claim to recover amounts not deducted—Employees' claim for unpaid superannuation allowance—Limitation—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16)— *Tees Conservancy Act,* 1907 (7 *Edw.* 7, *c. civ.*), *s.* 4.

The Tees Conservancy Act, 1907, s. 4, provides: " Subject to the provisions of this Act every officer and servant of the Commissioners . . . . shall contribute annually for the purposes of this Act a percentage amount of his salary or wages according to the scale laid down by the Act such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the superannuation fund. . . . ."

Sect. 11 defines which officers or servants of the Commissioners shall be entitled on ceasing to hold their offices or employments " to receive during life out of the superannuation fund a superannuation allowance according to the scale laid down in this Act."

The defendants were employed by the Tees Conservancy Commissioners and were subject to the provisions of the Tees Conservancy Act, 1907, which established a contributory scheme of superannuation. From 1915 onwards, the Commissioners paid a bonus to their servants, but failed to deduct any contributions in respect of it for the fund and calculated the superannuation allowances which became payable under the Act on the basis that it was not " wages or salary." In 1933, it was held by the Court of Appeal that the bonus was " wages or salary " and that the superannuation allowances must be calculated on that footing:—

Held, (1.) that nothing in s. 4 imposes on an employee any liability to pay contributions otherwise than by permitting the Commissioners to make deductions from his salary or wages according to the scale laid down by the Act.

(2.) That in the case of superannuated employees, the Commissioners could not recover from them the amount of the contributions which should have been deducted in respect of bonus.

Dewhurst v. *Salford Guardians* [1925] Ch. 139, 655; [1926] A. C. 619 distinguished.

Gissing v. *Liverpool Corporation,* ante p. 1 considered.

(3.) That in the case of persons still in the employment of the Commissioners, deductions of the appropriate contributions should be made in each year; but that the Commissioners had

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no power to make further deductions in respect of any sums which should have been deducted in some other year.

(4.) That the Limitation Act, 1623, applied to the employees' claim for unpaid superannuation allowance, which was thereby subject to a limitation of six years.

Salford Corporation v. *Lancashire County Council* (1890) 25 Q. B. D. 384 followed.

ADJOURNED SUMMONS.

The Tees Conservancy Act, 1907, empowered the Tees Conservancy Commissioners to establish a superannuation fund for the benefit of the officers and servants in their employment. The fund was to be formed by contributions from the employers and from the employees.

Sect. 4 provides as follows: "Subject to the provisions of this Act every officer and servant of the Commissioners who—

(A) has completed the twenty-first year of his age; and

(B) has been continuously in the service of the Commissioners for at least six months;

shall contribute annually for the purposes of this Act a percentage amount of his salary or wages according to the scale laid down by this Act such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the superannuation fund. . . . ."

Sect. 6 provides as follows: "The Commissioners may permit an officer or servant whose salary or wages have ceased to be paid by reason of his incapacity through ill-health to discharge his duties and whose name remains on the books of the Commissioners to resume his contributions to the superannuation fund at any time within twelve months from the date of stoppage of his salary or wages at the rate at which the contributions were being paid when the Commissioners ceased to pay his salary or wages and in the event of his availing himself of such permission his services shall for the purposes of his title to superannuation allowance be deemed to have been continuous but in computing the amount of his allowance the actual period during which he has not contributed shall be deducted."

Sect. 7 provides for the percentage amounts of salary or wages to be deducted for the purposes of the Act and s. 8 prescribes the contributions to be made by the Commissioners.

Sect. 11 provides: "Subject to the provisions of this Act every officer and servant of the Commissioners who—

(A) has completed his sixty-fifth year of age; and

(B) has completed not less than twenty years continuous service; and

(C) in the case of an officer or servant in the service or employment of the Commissioners at the passing of this Act has contributed for not less than eight years to the superannuation fund in conformity with the provisions of this Act; shall be entitled on resigning or otherwise ceasing to hold his office or employment to receive during life out of the superannuation fund a superannuation allowance according to the scale laid down in this Act."

Sect. 10 provides that in the case of the amount standing to the credit of the superannuation fund proving inadequate the deficiency is to come out of the revenue account of the Commissioners, and s. 13 provides a scale for superannuation allowance.

From March 1, 1915, onwards, the plaintiffs paid their employees a bonus in addition to the previous amount of their remuneration. From the latter, appropriate deductions were made by the plaintiffs to provide for the superannuation fund, but no deduction was made from the bonus, which was not treated as being "wages or salary" for the purposes of s. 4 of the Act and was not brought into calculation in assessing the amount of superannuation allowances which became payable. On July 26, 1933, in *James* v. *Tees Conservancy Commissioners* (unreported) the Court of Appeal, affirming Maugham J., held that the bonus was "wages or salary" within the meaning of the Act and that consequently the superannuation allowances must be calculated on that footing.

The first four defendants were officers or servants of the plaintiffs who had retired from their service and had become entitled to be paid superannuation allowances, Henry James on November 1, 1930, Charles Hodgson on August 16, 1931, Thomas Rennison on October 30, 1933, and Samuel Barker on December 10, 1927. The last defendant, Robert Wormald, was still in the employment of the plaintiffs and had entered their service in 1902.

The plaintiffs took out this summons to determine (1.) whether they were entitled to recover from the defendants the amount of the deductions which should have been made from the bonus for the purposes of the Act and which had not been made, and (2.) whether the claim of those defendants who had retired from the service of the plaintiffs to recover the additional amount of superannuation allowance which should have been paid to them in previous years, on the footing that the bonus was "wages or salary," was subject to a limitation of more than six years.

Stuart Bevan K.C. and *F. Grant* for the plaintiffs. Sect. 4 of the Tees Conservancy Act, 1907, imposed on the employees a duty to contribute to the superannuation fund, but imposed no obligation on the employers to recover the amount of the contributions by deductions from wages or salaries. The arrears of contributions may be recovered as a debt at any time. In *Gissing* v. *Liverpool Corporation* (1) the Court was dealing with s. 12 of the Poor Law Officers' Superannuation Act, 1896, which was in precisely the same terms as s. 4 of this Act, and the observations of Romer L.J. and Maugham L.J. make it clear that such contributions as these need not be made by any special method or at any special time. In *Dewhurst* v. *Salford Guardians* (2), where the plaintiff had left the service of the defendants, the declaration made in his favour that bonus paid in addition to his salary must be included in the computation of his superannuation allowance was expressed by Warrington L.J. to be "subject to the obligation of the plaintiff to contribute to the common fund, as provided for by the Act."

This question was raised by reason of the claim of the plaintiffs to an increased superannuation allowance calculated on the basis of the bonus paid to them. It would be inequitable to allow them to receive this benefit while disclaiming the corresponding liability. There would be no hardship at all in setting off the arrears payable on the contributions against the arrears payable on the pensions ; nothing need be taken out of the pockets of the plaintiffs. In such a case as this, the Court's equitable jurisdiction is not ousted because the claim is based upon a statute. On equitable principles the amount of the contributions which were not deducted from the wages or salaries paid can be recovered as money paid under a mistake as to the existing rights and interests of the parties : *Stone* v. *Godfrey* (1) ; *Rogers* v. *Ingham* (2) ; *Allcard* v. *Walker.* (3) Moreover, the Commissioners are in the position of trustees and must have regard to the interests of the fund generally, for though under s. 10 of the Tees Conservancy Act, 1907, they are bound to make up any deficiency in the fund, circumstances might conceivably arise in which they would be unable to do so.

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(1) Ante pp. 1, 26, 33.

(2) [1925] Ch. 655, 672.

As to the question of statutory limitations, the claim of the Commissioners is not barred. The period of limitation in this case is twenty years, since a liability arising under a statute is within the words " or other specialty " in s. 3 of the Civil Procedure Act, 1833 : *Cork and Bandon Ry. Co.* v. *Goode* (4) ; *Shepherd* v. *Hills.* (5) The claim of the employees to arrears of superannuation allowance would, however, be subject to a limitation of six years under the Limitation Act, 1623, as being a claim against a common fund : *Salford Corporation* v. *Lancashire County Council.* (6)

The defendants should pay interest on the arrears of their contributions under s. 28 of the Civil Procedure Act, 1833. The Tees Conservancy Act, 1907, is a " written instrument " within that section, since a statute is the highest form of specialty. The sums to be paid and the dates of payment are " certain " within the meaning of the section : *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (7) This decision should

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(1) (1854) 5 De G. M. & G. 76, 90.
(2) (1876) 3 Ch. D. 351, 357.
(3) [1896] 2 Ch. 369, 381.
(4) (1853) 13 C. B. 826.
(5) (1855) 11 Ex. 55, 67.
(6) (1890) 25 Q. B. D. 384, 388, 391.
(7) (1875) L. R. 10 Q. B. 371.

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be followed rather than the earlier case of *Merchant Shipping Co.* v. *Armitage* (1), which is in conflict with it. This is an action for the recovery of a debt and there is therefore also jurisdiction to award interest under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.

Gover K.C. and *H. Garland* for the first four defendants. The arrears of contributions do not constitute a debt. The only statutory duty imposed on the employees was to submit to deductions in each year according to the scale laid down by the Tees Conservancy Act, 1907. There was an obligation on the employers to make deductions annually from wages or salaries for the purposes of the fund. In the case of persons no longer in their employment and no longer in receipt of wages or salaries, there could be no power to make deductions. The word " pay " is never used in the Act, but always such expressions as " contribute " or " make good." In *Dewhurst* v. *Salford Guardians* (2) Warrington L.J. makes it clear that the obligation on the employers to make the proper deductions is imperative. The observation in his judgment on which the plaintiffs rely to show an obligation on these defendants to pay the arrears of contributions is explained by the fact that in that case the former employee had tendered the amount of the unpaid contributions and the Court thought it right that the tender should be taken into account in adjusting the rights of the parties. The decision in *Gissing* v. *Liverpool Corporation* (3) turned on the effect of s. 124 of the Local Government Act, 1929, and does not affect this point. In that case, the plaintiff was still in the employment of the defendants, and the observations of Maugham L.J., relied on by the plaintiffs in this case, had reference to the contributions due by her during the remainder of her service. Farwell J. made it clear that there was a statutory duty on the employers to make the appropriate deductions from the wages or salary of the employee, and Lord Hanworth M.R. in the Court of Appeal expressly approved his finding on this point. (4) The Tees Conservancy Act, 1907, created an obligation which is

(1) (1873) L. R. 9 Q. B. 99.

(2) [1925] Ch. 655, 660, 672.

(3) Ante pp. 1, 33.

(4) Ibid. 1, 5, 20.

to be enforced in a specified manner by deduction, and which cannot be enforced in any other manner: *Pasmore* v. *Oswaldtwistle Urban District Council.* (1) The arrears of contributions cannot be recovered on the ground of mistake. An action for money had and received does not lie against a person who has received money from another with perfect knowledge of all the facts common to both, merely because it is said that the claim to the money was not well founded in point of law: *Rogers* v. *Ingham.* (2)

With regard to the claim of the defendants to unpaid superannuation allowance, the statutory limitation should be twenty years. There is no real distinction between this claim and the claim of the plaintiffs. The observations in *Salford Corporation* v. *Lancashire County Council* (3) on which the plaintiffs rely to establish a limitation of six years are obiter dicta and not binding on the Court.

Should the plaintiffs succeed in their claim to recover arrears of contributions, no interest would be payable by the defendants. The arrears are not a "'debt" within s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. Further, they do not fall within the scope of s. 28 of the Civil Procedure Act, 1833, since neither the sums to be paid nor the dates of payment are stated in the Tees Conservancy Act, 1907, so as to make them "certain." But the plaintiffs are trustees of the fund and are liable to pay interest on the amount of the unpaid superannuation allowances: *In re Hulkes. Powell* v. *Hulkes.* (4)

W. E. Vernon for the fifth defendant. The plaintiffs were under a statutory obligation to make these deductions and neglected to do so. It would be a great hardship if they were permitted to deduct these contributions all together from the wages of the defendant. The obligation imposed by s. 4 of the Tees Conservancy Act, 1907, is that the employee "shall contribute annually" a percentage of his salary or wages, the scale being fixed by s. 7 of the Act. To allow the deductions made in any one year to exceed the percentage so fixed would be contrary to the Act. The arrears of contributions cannot constitute a debt, since the Act nowhere lays down who would be entitled to enforce payment or gives the Commissioners any right to sue for their recovery. The only power given is the power to make deductions. The decision in *Gissing* v. *Liverpool Corporation* (1) really turned on the peculiar wording of s. 124 of the Local Government Act, 1929. Romer L.J. in the observation relied on by the plaintiffs did not go further than to indicate that in the circumstances of the arrangement between the parties in that case, the proper contributions must be treated as having been made in the past so as to bring the employee within the section.

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(1) [1898] A. C. 387, 394.
(2) 3 Ch. D. 351, 355.
(3) 25 Q. B. D. 384.
(4) (1886) 33 Ch. D. 552.

Stuart Bevan K.C. in reply.

FARWELL J. [after stating the facts and reading the relevant sections of the Tees Conservancy Act, 1907 :] It is not disputed by the plaintiffs that the first four defendants are entitled to a pension calculated on the footing that the bonus was part of their wages. That was settled by the decision of the Court of Appeal. But there is a question whether the Commissioners are under any obligation to pay a sum representing such pension for more than six years or whether the Statute of Limitations applies. There is also a question whether the Commissioners ought, or have the power, to deduct from any payments which they make, or otherwise recover from the defendants, the contributions which they ought to have made since 1915, when the bonus was first paid. There again there is a question whether or not any Statute of Limitations applies. Finally, there is the question, which may arise whichever way I decide the other questions, as to payment of interest, either on sums payable to the Commissioners or by the Commissioners. To get rid of the last question at once I may say that I think it is quite plain, having regard to s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, that the matter is one in my discretion. This is a case in which I think there should be no interest on either side, and in exercise of my discretion I so decide.

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(1) Ante pp. 1, 25.

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I am going to deal in the first instance with the first four defendants' case alone. The position is this. These four persons have earned their pensions: they have ceased to be employed by the Commissioners. They are therefore no longer in receipt of wages or salary, but they are each entitled to a pension, and to a pension calculated in the way provided by the Act, on wages including therein the bonus. They have not made the full contributions to the fund in the past—not through any fault of theirs, but through a mistake by the plaintiffs as to the bonus. The question is whether these persons are entitled to their pensions without any deduction or payment by them of the contributions which should have been made in the past. That must depend upon the true construction of the Act. The Act, as I have already pointed out, provides for the establishment of a superannuation fund, and s. 4 of that Act provides that every officer and servant shall contribute annually a percentage amount of his salary or wages according to the scale laid down by the Act, "such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the Superannuation Fund." Looking at that section without regard, for the moment, to any decided cases, it appears to me reasonably plain that there is a statutory obligation on the employees to contribute, and there is an equally binding statutory obligation on the Commissioners to deduct. I am quite unable to see how this section can be construed, as I am invited by the plaintiffs to construe it, as a statutory obligation on the employees to contribute, with no statutory obligation on the Commissioners to deduct, merely a permission to them to make the deduction. The language of the section seems to me to be totally inconsistent with any such construction. It is plain and in my view quite unequivocal; the employees shall contribute and the amount is to be deducted from time to time by the Commissioners. In my judgment, apart from authority to which I must refer in a moment, the effect of this section is this: the fund which is to be provided for the purpose of enabling the pensions to be paid is a fund to be formed partly by contributions from the officers and servants, those contributions being made by the officers and servants suffering a deduction from their wages of the appropriate percentage. There is, in my judgment, nothing in this section which imposes upon the employees any obligation to pay otherwise than by permitting the proper deductions, and the obligation to make the deductions is as binding on the Commissioners as is the imposition upon the employees of the deductions which the Commissioners are to make. Nothing is to be found in that section or in any other section in this Act, so far as I can see, which in terms imposes an obligation to pay as distinct from an obligation to contribute; nor is there anything in the Act which in terms defines to whom payment is to be made; that is to say, if it were a case of an obligation to pay, there is nothing in the Act which determines who are the persons who are entitled to enforce payment, and in my judgment it is reasonably plain on the wording of this section that there is nothing which imposes any liability on the employee to pay otherwise than by permitting a deduction, and the only deduction which can be made is from the wages or salary payable to him.

Now, if that be the true construction of the Act, it must follow that in the case of those persons who have become entitled to a pension but have ceased to be in the employment of the Commissioners there can be no deduction whatsoever, because if I am right so far in the view which I take of the meaning of this section, the only right to deduct is from wages or salary, and there being no wages or salary payable to these persons, there can be nothing from which they can suffer a deduction. I find nothing in the Act itself which entitles the Commissioners to sue these persons for the contributions which they, the Commissioners themselves, ought to have deducted, nor can I find anything which gives them the right to make a deduction from anything except wages or salary.

But before I leave this part of the case I must consider for a moment two authorities which have been cited which

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it is said render it impossible for me to give effect to my view of the construction of the Act. The first of these two cases is *Dewhurst* v. *Salford Guardians.* (1) That case went to the Court of Appeal and subsequently to the House of Lords. It was a decision on the Poor Law Officers' Superannuation Act, 1896, which contains a section in the same terms as the s. 4 of the Act which I am considering. That case decides that it is impossible for either an employee or an employer to contract out of the Poor Law Officers' Superannuation Act, 1896; that there can be no binding contract made which can relieve the employer from the necessity of paying the pension or the employee from making the contribution and thereby evading the provisions of the Act. That decision does not affect the case which I am considering, but there is a passage at the end of the judgment of Warrington L.J. which is reproduced, if I may say so, in the order made by the House of Lords to which I must refer. He says this (2): "I think, therefore, that the decision of Astbury J. must be set aside, and that the plaintiff must have the relief asked by the statement of claim, which, I think, in substance is correct, but that is open to discussion. What is asked is a declaration, and an account of the money due to him founded upon that declaration, and, in my opinion, he is entitled to the costs here and below. But to the declaration should be added the words 'subject to the obligation of the plaintiff to contribute to the common fund, as provided for by the Act.'" It is to be noticed that those words, which are in inverted commas, the learned Lord Justice says are to be added to the declaration. There was not, so far as I can see, any account directed by the order of any sums due from the plaintiff, but it is said that since in that case the plaintiff had ceased to be in the employment of the guardians when the action was brought, and since, apparently, the learned Lord Justice took the view that there might still be an obligation to contribute to the common fund, that can only have been on the footing that the plaintiff was still under an obligation to have deductions made or to contribute

(1) [1925] Ch. 655; [1926] A. C. 619. (2) [1925] Ch. 655, 672.

to the fund which could not be limited to an obligation to suffer a deduction from wages or salary because there no longer were wages or salary, and must mean that there was an obligation upon the employee to pay as distinct from suffering a deduction from wages or salary. It is a little difficult in that case to follow from the report exactly what the position was, but this does appear, that (1): "In computing the plaintiff's superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, the defendants had disregarded the bonus and based their computation on the salary alone. They had in fact never deducted the statutory 2 per cent. contribution on the bonus, and on July 20, 1923, they refused a tender covering that amount." So that it appears that before action brought the plaintiff had tendered to the guardians the amount which they ought to have deducted under the Act from his wages and salary in the past; that tender was refused, and then the plaintiff commenced the action for a declaration. It may well be that, having regard to the fact that the plaintiff had tendered the amount of the contributions which should have been made when the Court came to deal with the rights of the parties, it took the view that the fact that he had made that tender should be taken into account in ascertaining the amount which was actually payable to him. I do not find anything else in that case which is in any way inconsistent with what I believe to be the true construction of s. 4 of the Act which I am considering, and on the whole I think that I am not precluded from giving effect to my own view of the construction of this section.

The other case to which reference has been made is the case of *Gissing* v. *Liverpool Corporation*. (2) That was a case in which the Court of Appeal reversed a decision of mine. That case is not on all fours with the case I am now considering, but it may be relevant, because one of the sections which gave rise to the question there was precisely the same as s. 4 of the Act which I am considering. In that case the plaintiff was a woman who had been in the employment of

(1) [1925] Ch. 655.

(2) Ante p. 1.

the West Derby Board of Guardians at Liverpool for many years. She admitted that for a considerable period no deduction had been made from her wages, because it was thought at the time that she did not come within the pension scheme at all. Ultimately it was decided that a person in the position of the plaintiff was within the scheme and therefore she became entitled to a pension, and none the less so that she had not made the contributions. That that was the true position appears from my judgment, which in that respect was approved by the Court of Appeal. What I said was this (1): " Under that Act " (that is the Poor Law Officers' Superannuation Act, 1896, which contained precisely the same section as s. 4 of this Act), " the plaintiff was entitled to a pension at the appropriate time and under the appropriate circumstances, having regard to the provisions of s. 2 of the Act. Also it is plain that it was the duty of the guardians to make the appropriate deduction from the salary or wages which were payable to her. In fact the guardians failed to make any such deduction, with the result that for many years the plaintiff was receiving her wages without any deduction under s. 12 of the Act, but nevertheless being entitled to her pension if and when the right time arrived. She had, in fact, a vested right to her pension, and that I think cannot be doubted, having regard to the case which has been referred to of *Salford Guardians* v. *Dewhurst.* (2)" That that portion of my judgment was approved by the Court of Appeal appears from the Master of the Rolls' judgment. He says (3): " Farwell J. said that the plaintiff had in fact a vested right to her pension." Then he reads the rest of the passage I have just read, and then says: " We agree with the view so taken by Farwell J." That case therefore decides that the right to the pension is an absolute vested right in the employee notwithstanding that the appropriate contributions have not been made by the employee. The real difficulty which arose in that case was not under that section at all. It was admitted, or rather it was decided, that the plaintiff had a vested right and would have remained entitled to her pension notwithstanding the failure to make the necessary deduction if the guardians had remained in existence. What happened was that the guardians ceased to exist and their place was taken by the Liverpool Corporation. Then the question arose whether under s. 124 of the Local Government Act, 1929, the plaintiff was entitled as against the Corporation to the payment of her pension. That turned almost wholly, in my view, upon the words of s. 124 of that Act, which were in these terms: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896 (in this section referred to as 'the Act of 1896'), have been made is, by virtue of this Act, transferred to the service of any council, then, if the council to whose service he is transferred have no superannuation scheme or if, in the case of an officer transferred to the service of a council who at the appointed day have such a scheme, he gives, within three months after the appointed day, notice in writing to that council that he elects to remain subject to the provisions of the Act of 1896, that Act shall apply to him subject to such modifications as the Minister may by order direct, and shall continue so to apply to him so long as he is in the service of the council of any county or county borough until, under such statutory provisions as may be made for the superannuation of persons employed by the councils of all counties and county boroughs, there becomes applicable to him a superannuation scheme not less favourable than that provided by paragraph (*a*) of the next following subsection." The whole point in the case, shortly put, was whether the plaintiff was a person who had made the contributions required by the Act. In one sense she clearly was not, because she had not suffered the necessary deductions, through no fault of her own. There was an arrangement entered into between the plaintiff and the Corporation under which certain deductions were being made, but at the date of the passing of that Act she was not a person who had made the full contributions. In those circumstances, I came to the conclusion that the plaintiff was not entitled

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(1) Ante pp. 1, 5.

(2) [1925] Ch. 655.

(3) Ante pp. 1, 20.

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to a pension. That view was not accepted by the Court of Appeal, and they came to the conclusion that notwithstanding that the whole of the payments had not been made the plaintiff was entitled to her pension. That decision does not prevent me giving effect to what I believe to be the true construction of s. 4 of this Act, and indeed it is to some extent in favour of that view, because the Court of Appeal held that notwithstanding her failure to make the contributions the plaintiff there was entitled to her pension. But there is this difficulty, that Maugham L.J. at the end of his judgment says this (1): " For those reasons, in addition to those which have been given by my brethren, I am of opinion that this judgment should be reversed and that we should hold that Kate Gissing has not forfeited her rights to superannuation allowance, and subject to the payment in due course of any contributions which may still be due from her she will be entitled, subject to the provisions of s. 124, to the benefits of the superannuation scheme embodied in the Act of 1896."

In that case it is clear that the plaintiff was still at the time the action was brought in the employment of the Corporation, and I do not think that Maugham L.J. meant more than this, that it was still open to the Corporation to make the deductions for the rest of her employment which they had been making under the arrangement which had been entered into between herself and the Corporation. In my judgment, there is nothing in that decision which prevents me giving effect to the view which I take of the effect of this Act. Under those circumstances, so far as the first four defendants are concerned, I am satisfied that they are entitled to their pensions and they are not under any obligation to pay any part of the contributions which should have been deducted in the past, nor are the Commissioners entitled to make any deduction from the pension now payable to them in respect of such contributions. As I have already said, s. 4 in my judgment does not impose an obligation to pay on the employees; it imposes an obligation to submit to a deduction from wages, and the obligation on the Commissioners is an obligation to deduct which is limited to deduction from wages and salary. If there are no wages or salary from which a deduction can be made then it must follow, in my view, that there can be no deduction at all.

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(1) Ante, p. 33.

That disposes of the matter so far as the first four defendants are concerned, with the exception of the question of the Statute of Limitations. With regard to that I think it is plain on the authorities which Mr. Bevan cited to me that if this had been a case where the Commissioners were entitled to make a claim against the employees, the statutory period would be twenty years. Such a claim would be an action for debt on the Statute and as such the debt would be a specialty debt, and therefore twenty years would be the right period. But in the case of the employees, although their rights arise under the Tees Conservancy Act, their claim is against a common fund, and according to the view expressed by Lord Esher M.R. and by Lopes L.J. in the case of the *Salford Corporation* v. *Lancashire County Council* (1), such a claim as that is one to which the Limitation Act, 1623, applies and six years is the right period. Lord Esher M.R. said (2): "There is another fatal objection to the claim of the plaintiffs. Supposing that an action could be brought against the County Council to make them liable for the whole of the claim of the plaintiffs, it seems to me that the liability would be to pay out of a particular fund, and that is enforced by action on the case, and not by action for debt on the statute. To such an action the six years' limitation of the Statute of Limitations would apply, and the claim of the plaintiffs would be barred." Lopes L.J. says the same thing (3): "Assuming for a moment that the council can be sued, I am of opinion that the proper mode of proceeding against them would be by an action on the case, not for debt, as in this claim. If this had been an action on the case, then the Statute of Limitations would have been an answer to any claim arising more than six years before action, and so to the only matter in dispute in this action."

(1) 25 Q. B. D. 384.
(2) Ibid. 388.
(3) Ibid. 391.

It may be that those statements in the judgments of those two learned judges were dicta in the sense that they were not necessary for the determination of that case, but they are dicta which I think I ought to follow, and accordingly I hold that the employees' claim is limited to six years. That disposes of the case so far as the first four defendants are concerned.

That leaves me to deal with the case of the defendant Robert Walker Wormald. In his case I feel considerably more difficulty, for this reason: he is a person still in the employment of the Commissioners and in receipt of wages or salary, and, therefore, he is a person from whom it is still possible for the Commissioners to make deductions for the purpose of providing the necessary contributions to the fund. If he is not liable to suffer deductions to make up for the deductions which should have been made in the past, it must be on different grounds from those which I have already given as the grounds of my decision in the case of the first four defendants. It has been urged by counsel on his behalf that it will be extremely hard in his case if these deductions have to be made. He has some two years' service to run before he gets his pension, and it is said that to make deductions against him for the past might deprive him of the whole or the greater part of his wages for the rest of his period of service. I appreciate that, but I cannot decide this case on the ground that it would be a hardship on the defendant to find against him. I must see whether the Act itself assists to a solution of the matter. In this case there are wages from which a deduction can be made. What are the rights of the Commissioners in respect of such deductions? They are these, as it appears to me: they are bound to deduct from the wages of the employee the amount in each year which is required for the purposes of the fund, because the obligation on the employee is to contribute annually for the purpose of the fund according to the scale laid down by the Act, and the obligation on the Commissioners is to make that deduction; that is to say, the employee must suffer the deduction and the employers must make the deduction annually for the purpose of the fund, and the percentage amount of salary or wages to be deducted is to be in the case of the employees according to their ages, either 2½ per cent. per annum or some other percentage up to 5 per cent. That being so, the question is: Does the right to deduct only apply to the contributions for one year having regard to the amount of the wages which are payable for that year? There is to be an annual contribution, and the deduction is to be made so that that annual contribution may be provided. There is no obligation on the man to pay, but there is an obligation on him to permit the deduction from his wages of the amount required for the superannuation fund. In my judgment, on the true construction of the Act, in each year there must be a deduction from wages, including bonuses, of the appropriate contribution for that year, but there is nothing which enables the Commissioners to make a deduction in respect of any sums which they ought to have deducted in some other year. That again is said to be inconsistent with the decision of the Court of Appeal in *Gissing's* case, and it is pointed out that Romer L.J. at any rate seems to have taken the view that an arrangement could be made under which the employers might make deductions at any rates and at any times during the employment. In that case there was an arrangement, whether it was a binding legal contract or not, under which the employee was suffering a deduction which was more than the amount she would have otherwise had to suffer, in order to adjust matters so far as possible. I think that Romer L.J. did not mean to say more than this, that there being that arrangement between the parties it must be treated as though there had been proper deductions made in the past and that accordingly the lady came within the words at the beginning of s. 124. However that may be, that case has caused me some difficulty, because I think that isolated passages from some of the judgments may seem to suggest that the view which I have expressed is wrong, but when that case is considered as a whole and one sees exactly what the decision was under the somewhat special circumstances, in my judgment there is nothing which prevents me holding, as I do hold, that

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no deductions can be made against those persons who have earned their pension, nor against those persons who are still in the service of the Commissioners in respect of past contributions. With regard to the persons who are still in the employment of the Commissioners, the Commissioners must of course make the proper deductions in the future of the amount of the current contributions from the current wages.

Solicitors : *Stokes & Stokes, for Belk & Smith, Middlesbrough ; Pattinson & Brewer, for J. W. R. Punch & Robson, Middlesbrough.*

F. H. C.

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March 26.

In re MAIR.

RICHARDS *v.* DOXAT.

[1935. M. 371.]

Will—Settled Legacy—Protected Life Interests—Forfeiture upon Alienation—Application to raise capital moneys for benefit of Tenants for Life—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

An order of the Court under s. 57 of the Trustee Act, 1925, giving power to trustees to raise capital moneys for benefit of life tenants will not cause a forfeiture of protected life interests, because the section is an overriding section, the provisions of which are to be deemed to be read into every settlement.

ADJOURNED SUMMONS.

By his will, dated July 1, 1901, the testator, after appointing trustees and making certain dispositions, gave all his residuary real and personal estate upon trust for sale or conversion and investment, and his trustees were to stand possessed of the trust premises upon trust to pay one third of the income to his wife, the defendant Emma Collinson Doxat (then E. C. Mair), and one third to his daughter, the plaintiff Mary Cassandra Richards (then M. C. French), " during her life unless and until some event shall have happened or shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or of any part thereof." The third part of the income was settled on trusts for the benefit of the testator's grandson, Hugh Ronald French. In the case of the death of his wife, daughter or grandson, his or her share of income was to be divided into two equal parts and be held upon the same trusts as were in the will declared in favour of such two of them as should be the survivor.

The testator died on March 1, 1902, and Hugh Ronald French died on July 5, 1929.

The plaintiff is now of the age of sixty-nine years and has no children, and the defendant E. C. Doxat is seventy years of age and has never had a child. In the events which have happened, subject to a discretionary trust, if either of them incurred the forfeiture clause, in favour of themselves and their husbands, they are now absolutely entitled to the whole fund.

Owing to severe fluctuations of income the plaintiff had incurred a considerable amount of debts, and she was anxious that the trustees should raise a sufficient amount out of the capital to enable her to pay off the debts. The defendant, E. C. Doxat, consented to this being done if a like amount were raised on her behalf. The trustee, accordingly, prepared a scheme having this object in view. The plaintiff then took out this summons, which asked that it might be determined whether, if effect be given to the proposals embodied in the scheme, forfeiture of the life interests of the plaintiff and the defendant, E. C. Doxat, in any part of the trust estate would be incurred, and it raised the question whether, if the Court sanctioned the scheme under s. 57 of the Trustee Act, 1925 (1), under which this application was made, the

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(1) The Trustee Act, 1925, s. 57, provides as follows:

"(1.) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, forfeiture clause would be brought into operation. None of the parties before the Court opposed the scheme.

Roger Turnbull for the plaintiff. There is no authority on the point raised in this case. There is one reported case, *In re Salting. Baillie-Hamilton* v. *Morgan* (1), where Eve J. made an order under s. 57 of the Trustee Act, 1925, but the circumstances were different. I submit that s. 57 introduces an overriding power, and that if the Court sees fit to make the order asked for under it, the forfeiture clause will not come into operation.

[He also referred to *In re Mair. Williamson* v. *French.* (2)]

L. W. Byrne for E. C. Doxat.

R. C. H. Horne, W. S. Wigglesworth, and *M. G. Hewins* for other parties.

FARWELL J. The first question which I have to determine on this summons is whether a certain scheme, if approved by me, will operate to create a forfeiture of the life interest given to two ladies under the will of the testator.

It is not necessary for me to read the will in any detail. The testator gave his residuary estate to his trustees " upon trust that my trustees or trustee shall pay one third part of the income of the said trust premises unto each of them my wife Emma Collinson Mair and my daughter Mary Cassandra French the wife of the Honorable Robert French (but as to the said Mary Cassandra French subject to the payments or retainer thereout hereinafter mentioned) during

either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2.) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3.) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4.) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

(1) [1932] 2 Ch. 57.

(2) [1909] 2 Ch. 280.

her life unless and until some event shall have happened whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or of any part thereof." In that event the income is held upon a discretionary trust (in the events which have happened) for the two ladies and their husbands, and subject thereto the two ladies together are absolutely entitled to the fund.

The scheme which is being put forward is primarily for the purpose of enabling one of the ladies to pay certain pressing liabilities. Whether or not the scheme be one which I ought to approve is a matter which I am not for the moment considering. It is enough to say that it involves payment out of capital of a very considerable sum to the former of the two ladies, the plaintiff, and the other lady, as a term of consenting to the arrangement, desires to have paid out to herself a capital sum equal to the amount raised to pay the debts.

It is quite plain that this is a scheme which, even if I approve it, could not be carried out at all except under s. 57 of the Trustee Act, 1925. Sect. 57 has been inserted in the new Trustee Act for the purpose of enabling and permitting the Court to sanction what would otherwise be breaches of trust —no doubt an extremely useful power.

The question which I have to determine is this. Assuming that the Court thinks it right to permit something to be done which is not within the terms of the trust document, will that, if it involves payment out of a capital sum, bring into operation this clause?

In my judgment, the answer to that question must be in the negative. If and when the Court sanctions an arrangement or transaction under s. 57, it must be taken to have done it as though the power which is being put into operation had been inserted in the trust instrument as an overriding power. One may take this case. If here the trustees had been given an overriding power to raise capital sums out of the residuary estate for the benefit of either of these two ladies, it could not be suggested that the exercise of that power would have brought this clause into operation. The true effect of the two clauses combined would have been that the forfeiture clause would only have operated on so much of the income as was from time to time payable to the ladies under the trust, and the exercise of the power, although it would have resulted in reducing the income, would not have had the effect of bringing into operation the forfeiture clause, but would have left the forfeiture clause to operate on so much of the income as was still payable.

If that be the true view, the effect of the Court permitting the exercise by trustees of some power which is not in the trust document itself and, therefore, something which the trustees could not do except by the direction of the Court, is the same as though that power had been inserted as an overriding power in the trust document, and if the Court comes to the conclusion that it is proper to permit trustees to take out of capital a sum of money for a particular purpose, a forfeiture clause of this sort will only operate upon so much of the income as remains after taking out of that capital sum, and the direction of the Court will not operate as an event whereby, if the income belonged absolutely to the tenant for life, he or she would be deprived of the personal enjoyment of it. In other words such a clause operates on the income from time to time payable to the life tenant. If there is a proper exercise of an overriding power, whether it be in the instrument itself or by virtue of s. 57, the exercise of that power does not bring into operation the forfeiture clause. The forfeiture clause remains attached to the income which is payable to the tenant for life from time to time. If this be the true view it must follow that it matters not whether the application to the Court is made by or with the consent of the tenant for life.

It must, however, be remembered that if a scheme sanctioned by the Court involves, as in *In re Salting* (1), an agreement or covenant by the tenant for life to pay premiums on policies or other like payments with a proviso that if they are not duly paid the trustees are to pay them out of income, the failure to pay by the tenant for life will create a

(1) [1932] 2 Ch. 57.

forfeiture, since it will be the act or omission of the tenant for life that creates the forfeiture and not the exercise by the Court of its overriding power.

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Solicitors: *Williamson, Hill & Co.; Barry O'Brien & Co.*

P. J. B.

In re WALKER'S SETTLEMENT.

CORPORATION OF THE ROYAL EXCHANGE ASSURANCE *v.* WALKER.

[1935. W. 477.]

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EVE J.
Feb. 22; *March* 5.
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April 15, 16.

Trust—Investment—Powers of trustees to concur in scheme of arrangement—Public utility company—Proposed transfer of capital to holding company—Exchange of stocks—No transfer of undertaking—Whether an amalgamation with another company—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 10, *sub-s.* 3 (*c*).

A scheme of arrangement was promoted by the directors of six electric lighting companies serving different London areas, under which their capital or at least 90 per cent. thereof was to be acquired by a holding company which would issue shares at par value to the stockholders in exchange for their holdings. The objects of the holding company were to control the policy of the constituent companies, to effect economies in administration, and to carry on other business which might advantageously be combined with that of the companies, but was beyond their powers. No transfer of the undertakings of the constituent companies to the holding company was either effected or intended, but the pooling of profits was suggested as a future possibility:—

Held, by Eve J. and the Court of Appeal, that the scheme was not an "amalgamation of the company with another company" within the Trustee Act, 1925, s. 10, sub-s. 3 (*c*), in which the trustees of a settlement comprising a sum of stock of one of the constituent companies were authorized to concur.

SUMMONS.

Under a settlement made in 1920 by the late Henry Claude Walker in favour of his children and their issue, the Royal

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Exchange Assurance as trustees thereof held a sum of 1125*l.* ordinary stock of the Westminster Electric Supply Corporation, Ld., one of the constituent companies with statutory rights and powers under the London Electricity (No. 2) Act, 1925.

A scheme had recently been set on foot for the formation of the London Associated Electricity Undertakings, Ld., as a holding company, and for the acquisition by that company of the whole or not less than 90 per cent. of the capital of the Westminster Corporation and five other associated electric light companies. On February 8, 1935, an offer was made by the holding company to the stockholders of the six companies to exchange their ordinary and preference stock for shares in the holding company at the rate in the case of ordinary shares or stock of a 1*l.* share in the holding company for every 1*l.* stock or 1*l.* share in the six companies. The holding company had power to extend this scheme to any other electric light companies in London and district, and other powers and objects wider than those of the Westminster or any other associated company and not subject to any statutory limitation of profit. The scheme did not propose to transfer the undertaking and business of the Westminster Corporation to the London Associated Company, but only the capital, and it would continue to carry on its business of supplying electricity as before subject to the control of the London Associated Company, the directors of which were mostly directors of the constituent companies. The trustees approved and desired to concur in the scheme, but took out this summons to have it determined whether it was an "amalgamation of the company with another company" which they were authorized to concur in by the Trustee Act, 1925, s. 10, sub-s. 3. (1)

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(1) Trustee Act, 1925, s. 10: "(3.) Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement—

(*a*) for the reconstruction of the company;

(*b*) for the sale of all or any part of the property and undertaking of the company to another company;

(*c*) for the amalgamation of the company with another company;

(*d*) for the release, modification, or variation of any rights, *H. B. Vaisey K.C.* and *W. T. Elverston* for the trustees. There is no definite legal meaning of the word "amalgamation." In s. 154 of the Companies Act, 1929, it is used in the sense that a scheme of amalgamation involves the transfer of the whole or part of the undertaking or property of one company to another company. That is not the case here, and it is submitted that the word is capable of a wider meaning.

In *In re Empire Assurance Corporation. Ex parte Bagshaw* (1) Lord Hatherley (then Wood V.-C.) said that it was difficult to say what the word "amalgamation" meant, and he had not the least conception of what the full legal effect of the word was.

It is a popular rather than a technical word, but we submit that what is proposed in the present case, involving the acquisition of practically the whole of the share capital of six electric light companies by a holding company, is an amalgamation of those companies and satisfies s. 10, sub-s. 3, of the Trustee Act, 1925. It is a substantial unifying of the interests in all these companies. It is not necessary that there should be a complete transfer of the undertakings. In *New Zealand Gold Extraction Co. (Newbery-Vautin Process* v. *Peacock* (2) Davey L.J. expressed doubt whether the word involved such a transfer or not. The language of s. 55 of the Finance Act, 1927, recognizes that the acquisition by one company of 90 per cent. of the share capital of another is a method of amalgamation, thus widening any earlier meaning to be attached to the word. It is an amalgamation of companies, but not of the undertakings belonging to those companies. And see *Wall* v. *London & Northern Assets Corporation* (3), per Buckley L.J.

C. E. Harman K.C. and *Gerald Upjohn* for beneficiaries who were infants or restrained from anticipation.

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privileges or liabilities attached to the securities or any of them;
in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities;
. . . ."

(1) (1867) L. R. 4 Eq. 341, 347.
(2) [1894] 1 Q. B. 622, 632.
(3) [1898] 2 Ch. 469, 478.

This scheme for the acquisition by a holding company of the share capital of other companies is not an amalgamation within the Trustee Act. The companies may be controlled from above, but they are not amalgamated. There are many modern instances of this kind of scheme, e.g., the Drapery Trust, Ld. By para. 11 of the scheme, the present companies are to continue in existence, and to carry on business as before, subject only to the supervising control of the board of the new company. The companies are not amalgamated either with each other, or with the holding company. It is what may be called a combine, but there can be no amalgamation of these companies with statutory powers over certain areas, except by virtue of a special Act of Parliament.

The cases, so far as they go, are against the view that this is an amalgamation, especially *Wall* v. *London & Northern Assets Corporation.* (1)

Sect. 55 of the Finance Act, 1927, only says that for the purposes of stamp duty on capital the acquisition by one company of 90 per cent. of the capital of another company is equivalent to an amalgamation.

F. R. Evershed K.C. and *N. K. Hutton* for beneficiaries sui juris accepting the scheme.

An amalgamation does not necessarily involve the acquisition of the businesses of the different companies to be amalgamated; it is sufficient if their capital or 90 per cent. of it is acquired. From the point of view of the corporators, it would make no difference if the undertakings of the companies were transferred.

An amalgamation means a common policy and a common management; the meaning of the word is now wider than the older authorities suggest: see Palmer's Company Precedents, 14th ed., vol. ii., at p. 1014. It is there defined and discussed under three heads, of which (*c*) is: "the acquisition by one company of the whole of or a controlling interest in the shares of another company or companies." That is the view of a learned text-writer of experience in such matters.

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(1) [1898] 2 Ch. 469, 478.

If the question is asked, With what is the amalgamation? the answer is: With the other five companies. The scheme has not been imposed on but is formulated by the directors of the six companies from whom the directors of the holding company will be selected. The case is very much like that of the London Passenger Transport Board.

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[They referred to Finance Act, 1927, s. 55, and to *Murex, Ld.* v. *Inland Revenue Commissioners.* (1)]

Cur. adv. vult.

March 5. EVE J. The plaintiffs are the trustees of a settlement executed by the late Henry Claude Walker on March 8, 1920. The defendants are all the beneficiaries except two who are of full age and resident in Australia. Included in the trust premises is a sum of 1125*l.* ordinary stock of the Westminster Electric Supply Corporation, Ld. A scheme is on foot for the acquisition by a holding company known as London Associated Electricity Undertakings, Ld., of the preference and ordinary stock and share capital of the Westminster and five other similar companies. On February 8, 1935, the holding company sent to the respective boards of the six companies a detailed statement of the scheme and of the terms on which they were prepared to acquire on or before April 6, 1935, the 550,000*l.* 4½ cumulative preference stock and the 1,450,000*l.* ordinary stock of the Westminster company. They offered to each ordinary stockholder of the Westminster company one ordinary share of 1*l.* fully paid in exchange for each 1*l.* of ordinary stock held by him in the Westminster company.

In substance, the inducement held out to the shareholders of the Westminster and other five companies for accepting the offer was that the immediate result of acceptance would be to emancipate them from their position as contributories in a statutory company restricted and confined to and within its statutory powers, and would make them shareholders in a public company formed with the objects and endowed by its memorandum of association with powers to embark

(1) [1933] 1 K. B. 173.

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in enterprises altogether outside the powers of the existing company, but calculated to produce a more satisfactory return in the way of profits on the capital invested.

I shall have to refer by and by to some of the terms of the scheme, but before examining them further it would be more convenient to explain the nature of these proceedings. By sub-s. 3 of s. 10 of the Trustee Act, 1925, it is provided that where any securities of a company are subject to a trust the trustees may concur in any scheme or arrangement: (*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company; and (*c*) for the amalgamation of the company with another company.

The trustees finding that the adult beneficiaries were not unanimous on the question whether the offer ought to be accepted or not, and being in doubt themselves whether the scheme is really one for the amalgamation of the Westminster company with the other five companies within the section referred to, this summons has been issued for the purpose of having it determined by the Court whether the scheme is one for amalgamation within the section and whether the trustees have power under such section to concur in the scheme and accept in exchange for the ordinary shares or stock in the Westminster company and retain as an authorized investment under the settlement such ordinary shares or share of the London company as is provided by the scheme.

The question, therefore, in issue is whether the scheme is or is not an amalgamation within the Trustee Act.

Before embarking on an examination of the scheme itself, reference to the memorandum of association of the London company shows that it was incorporated on February 2 last with a nominal capital of 300*l.* and with the object of acquiring not less than 90 per cent. of the issued share capital of each of the six companies and of any other company being an authorized undertaker for the supply of electricity within the county of London or of any adjoining or neighbouring county for such consideration and on such terms and conditions, whether in fully paid shares or otherwise, as the company shall think fit; and of carrying on in all its branches the trade or business of producing, storing, distributing, and supplying electrical energy for all purposes and of promoting, supporting, or opposing any Bill or Bills in Parliament for or with a view to improving or dealing with the distribution or supplying of electrical energy in the county of London and elsewhere, and of erecting and maintaining buildings of all descriptions and of promoting companies, lending money for undertaking, carrying on and executing all kinds of financial, commercial, trading, and other operations, together with many other objects not to be found as a general rule in the memoranda of companies whose ordinary shares are regarded as suitable for the investment of trust funds.

The scheme is dated January 30, 1935, and is endorsed as "Holding Company's scheme of merger." So far as I have hitherto referred to it I cannot help thinking that there is little in its conception which accords with the primary meaning attached to the word "amalgamation." The acquisition by the London company of a sufficient number of shares in each of the six companies to give the purchasing company the control of each company does not involve the conclusion of any bargain by the six companies to bring into a combination their several undertakings and assets or to sink the individuality of each company in a joint adventure.

Nor does the scheme itself disclose anything carrying the matter much further. It provides in para. 2 for the formation of the purchasing company with the object of acquiring the preference and ordinary capitals of the six companies subject to its being able to obtain relief from stamp duty under s. 55 of the Finance Act, 1927, by purchasing 90 per cent. of the ordinary capital of each of the six companies, the whole consideration consisting of fully paid shares or stock of the new company. The scheme then sets out particulars of the preference capital of each of the companies and of the terms on which this was to be dealt with. I can pass this over, because the applicants are only concerned with the scheme so far as it affects the ordinary stock of the Westminster company. Para. 6 deals with the price offered for the ordinary capital of each company, and concludes with a statement that the price will be one unit of the new company's ordinary stock fully paid for each existing ordinary share or stock unit of 1*l*., and that for the purposes of the scheme regard has been had to the true values of the ordinary shares of the companies without regard to the relative market quotations. I do not think I need read any of the paragraphs in full until I come to No. 11. That paragraph is in these terms: "The present companies will continue in existence and carry on business as before subject to the control of the board of the new company, which will, in the first place, consist wholly or chiefly of directors drawn from the boards of the existing companies. Under this unified control efficiency should be improved and economies effected in various directions —e.g., by bulk buying of materials, by centralizing office administration, and selling or letting surplus premises."

Para. 12 provides for the compensation of directors for whose services there is no further use, and then follows: "(13.) The new company will not be subject to control by the Electricity Commissioners and will be able to raise capital in any form it may think fit. No doubt, however, the Commissioners will require to be satisfied regarding the rate of interest charged by the new company to the constituent companies in respect of any loans made to them out of capital raised by the new company. If desired, the new company can undertake activities other than the business of selling current and apply any profits it makes without restriction. For example, it can take over the business of selling apparatus to consumers. (14.) The income of the new company will consist of dividends received on the shares held in the existing companies and any profit it may make from selling apparatus and from other activities. The expenses to be met out of such income will consist of office rent, secretarial and other salaries, directors' fees, and other administrative expenses in so far as they are not recovered by charges made against the constituent companies for managerial and other services.

(15.) After the scheme has been put into operation the businesses of the constituent companies will be conducted on lines likely to produce the best results for the undertakings as a whole. The effect may be that revenue will be diverted from one company to another, and the position may arise at some future date that one company has a separate profit over the amount required to meet its dividend while another company has insufficient profits. If, in course of time, it appears that this is likely to happen, the question of an arrangement for the pooling of profits can be considered. There seems to be nothing in the London Electricity (No. 2) Act, 1925, which definitely prohibits such an arrangement, but it would be advisable to obtain the approval of the Electricity Commissioners before bringing it into operation." This paragraph appears to me to be the only one in which anything like an amalgamation is adumbrated, but it is only a suggestion of something that may be done in the future and has no present application.

That is, I think, all I need read; the concluding paragraph deals with a statutory authority to amalgamate any two or more of the undertakings of any of the companies, subject to the approval of the Electricity Commissioners, but it is not suggested that this holding company's scheme of merger constitutes such an amalgamation, and I come back to the question whether this scheme is an amalgamation within the meaning of the Trustee Act. Speaking for myself, I can see nothing in it which connotes such a blending together in whole or in part of two or more separate undertakings as to amalgamate or fuse them into one. But it has been held in these Courts that there is no very precise meaning to be given to the words "amalgamate" or "amalgamation," that neither word has any definite legal meaning, that they are commercial and not legal terms, and even as commercial terms have no exact definite meaning. So be it, but in the very case in which these conclusions were authoritatively laid down the learned judge went on to express an opinion that an amalgamation must involve certain characteristics. There is no authority to which I have been referred wherein any doubt has been cast on the judgment pronounced by Buckley J. (as he then was) in *In re South African Supply and Cold Storage Co.* (1), and I think I am entitled to assume that the Legislature, when conferring this important power on trustees to concur in a scheme for the amalgamation of one company with another, must have contemplated an amalgamation embodying the characteristics enumerated by Buckley J. (as he then was). This present scheme does not, in my opinion, involve those elements which he regarded as essential for an amalgamation. Buckley J. said: "Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass—substantially they must pass—nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern."

In my opinion, I ought to answer the question raised in this summons in the negative, and I so do. Costs will be paid out of the capital of the estate.

H. L. L.

C. A.

The beneficiaries sui juris who desired the trustees to concur in the scheme appealed. The appeal was heard on April 15 and 16, 1935.

F. R. Evershed K.C. and *N. K. Hutton* for the appellants repeated the arguments used by them in the Court below.

C. E. Harman K.C. and *Gerald Upjohn* for the respondent beneficiaries not sui juris were not called upon to argue.

H. B. Vaisey K.C. and *W. T. Elverston* for the trustees, the Royal Exchange Assurance Corporation.

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(1) [1904] 2 Ch. 268, 287.

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LORD HANWORTH M.R. This case raises an interesting point, and one in which one must take a little trouble to explain the reasons why this Court is in agreement with Eve J.

I am taking some of the facts from his judgment, where he states them very accurately. [His Lordship read the first two paragraphs of the judgment of Eve J. and continued :] I now turn from that statement to take some excerpts from the scheme, which is called " Holding Company Scheme of Merger." The scheme has been prepared, it says, " in accordance with instructions received from the Central London Electricity Distribution Committee, 1934, Ld. Only the above-named six companies are concerned in the first instance, but the scheme has been drafted in such a way as to facilitate the inclusion of other companies later on. Particulars of the debenture and share capitals of the six companies are given in a statement attached hereto. (2.) A new company will be formed to acquire the preference and ordinary capitals of the companies, the object of acquiring the preference capitals being to obtain the relief from stamp duty granted, subject to certain conditions, by s. 55 of the Finance Act, 1927, in a case where not less than 90 per cent. of the total issued share capital of an existing company is purchased. The issued ordinary capital of the Chelsea company represents more than 90 per cent. of its total issued share capital, so that in the case of that company it is not absolutely necessary for the new company to acquire the preference capital, but for the sake of uniformity it is suggested that it shall do so. From enquiries made by Messrs. Slaughter & May at Somerset House it has been ascertained that in order to obtain relief from stamp duty it will be necessary for the new company to acquire the ordinary capital of the City undertaking of the Charing Cross company as well as that of the West End undertakings, notwithstanding the fact that the latter own the City undertaking's ordinary capital through the medium of the Suppliers Construction Company, Ld." ; now come important statements : " It will be unnecessary for the new company to acquire any of the debenture capitals. (3.) The whole of the consideration payable by the new company will consist of its own stocks, issued as fully paid, thus complying with the condition in s. 55 of the Finance Act, 1927, that in order to obtain relief from stamp duty not less than 90 per cent. of the consideration must consist of shares or stock of the transferee company." Then it sets out the exact position of the companies and of their stocks, and in para. 11 it says this: "The present companies will continue in existence and carry on business as before subject to the control of the board of the new company which will in the first place consist wholly or chiefly of directors drawn from the boards of the existing companies. Under this unified control, efficiency should be improved and economies effected in various directions, e.g. by bulk buying of materials, by centralising office administration and selling or letting surplus premises." I do not think I need read more of the scheme.

That being the offer made to the members of these several companies, a summons was taken out, asking that it may be determined "whether the proposed scheme for the transfer to London Associated Electricity Undertakings, Ld., of the issued capital of" (inter alia) the Westminster Electric Supply Corporation, Ld., in which the trustees are holders of shares "is a scheme for the amalgamation of the companies parties thereto within the meaning of s. 10, sub-s. 3, of the Trustee Act, 1925, and whether accordingly the plaintiffs as such trustees as aforesaid have power under such section to concur in the said scheme and to accept in lieu of or in exchange for the ordinary stock of the said Westminster Electric Supply Corporation, Ld., now held by them as such trustees as aforesaid and retain as an authorised investment under the said indenture of settlement such ordinary shares or ordinary stock of the said London Associated Electricity Undertakings, Ld., as provided by the said scheme."

When the matter came before Eve J. on that summons, he came to the conclusion that the scheme was not an amalgamation within the Trustee Act, 1925. He held this: "The acquisition by the London company of a sufficient number of shares in each of the six companies to give the purchasing company the control of each company does not involve the conclusion of any bargain by the six companies to bring into a combination their several undertakings and assets or to sink the individuality of each company in a joint adventure." It will be observed that the purpose, as indicated in the scheme, is the hoped for unified control which would promote efficiency in various directions, but the identity of each company is maintained, and the debenture capital of each company will remain the loan to each individual company and the responsibility of each individual company. In effect, the new company will be a supplying company, but the old companies will have to exercise the powers which are given to them under the statutes, and they will still remain separate entities.

That being so, I turn to look at s. 10, sub-s. 3, which is the section we have to construe: "Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement—(*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company; (*c*) for the amalgamation of the company with another company; (*d*) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them; in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities." Examining that section itself, it would seem that there are four possibilities contemplated—(*a*) the reconstruction of a company, (*b*) the sale of the property or undertaking of a company to another company, (*c*) what is called the amalgamation, not of undertakings, but in contrast with the previous cl. (*b*) it is the amalgamation of the company with another company; then (*d*) is for the release, modification, or variation of any rights, privileges and liabilities, which would include voting power and the like.

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The contemplated cases in which these changes occur, and in respect of which the trustees are empowered to concur and to accept new securities in place of the old, are three: they may accept any securities of any denomination of the reconstructed company, that refers to (*a*), or purchasing, that refers to (*b*), " or new company in lieu of or in exchange for all or any of the first-mentioned securities"; the new company must be appropriated to (*c*), and it would seem that what was contemplated was an amalgamation of the company with another company by means of a new company. I do not want to stress it or to place too much emphasis upon those words, but one certainly must say this, that there is no indication of what is meant by an amalgamation of the company with another company, except by the method of a new company, although I do not want to say that all amalgamations within the section can only be carried out by the means of a new company. One turns, however, to consider what is the meaning of the word "amalgamation." It has been explained by Buckley J., as he then was, that the word "amalgamation" has not any definite legal meaning, and that statement has been reinforced in a number of other authorities both before and since. I also think that it is right to bear in mind what was said in *Wall* v. *London and Northern Assets Corporation* (1)—namely, that when you are using a word like "amalgamation," you must look at the context in which it is used in order to ascertain its meaning. Chitty L.J. in that case said (2): "I agree that the term has no fixed meaning in point of law. You have to see how the term is used in the particular document that has to be construed." For my own part, I think that it would be impossible to give an exact or definitive interpretation to the word "amalgamation." I think that one will be able to identify an amalgamation when one sees it, but I hesitate to offer any suggestions of finality as to the interpretation of the word. The better course is to examine each case as it comes, and to determine, on the facts of that case, whether there is,

(1) [1898] 2 Ch. 469.

(2) Ibid. 481.

or is not, what may properly be called an amalgamation. It is only thus that one will elucidate what is the meaning of and what are the limits of "amalgamation."

I turn, therefore, to consider the present proposal. It is a proposal which, from the passage I have read from the scheme and the facts, connotes the continued identity of each separate company, with its board of directors more or less identified with the board of the new company, but not necessarily in every particular the same. Each company still carries its deadweight of debt in the form of its debentures. It is not proposed to dissolve any of the companies. The attraction is that the shareholders of the existing companies may find that in the new company they have got wider facilities and a possibility of more profitable adventures or undertakings or business. Can one call that an amalgamation? The observations made by Buckley J., in *In re South African Supply and Cold Storage Co.* (1) are, of course, matters to which one would pay great attention, but can one say that either of these companies is merged in the new one, that its identity has been lost and that there is a unification of the one company with another? The facts seem absolutely to contradict any such statement; and while one may give full weight to the prospect of unified control and improved efficiency by means of that unified control, still there is nothing like an amalgam made of the one company with the other. Further I would point out once more, for the purposes of emphasis, that in cl. (*c*) we are considering the amalgamation of a company with another company, and not what is by contradistinction referred to in cl. (*b*), the unification or the sale of the property or undertaking by one company to another. There is a definite indication in those clauses that the undertaking and property are considered apart from the company; and when we come to look at it, it is clear that the section contemplates the amalgamation of company with company, and not the amalgamation of undertaking with undertaking, or property with property.

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(1) [1904] 2 Ch. 268.

For these reasons it appears to me, as Eve J. put it, it " does not involve the conclusion of any bargain by the six companies to bring into a combination their several undertakings and assets or to sink the individuality of each company in a joint adventure." It has been suggested that before one can find amalgamation one must find that provision is made for the winding-up of the transferring company as no longer required to be maintained. I do not wish to accept that test. In some cases I do not think that that may be necessary. I do not think it will be a good touchstone to apply, but upon the facts of the present case it appears to me that there is no amalgamation, for the reasons which I have given, and therefore that Eve J. determined the question put to him rightly, and the appeal must be dismissed.

ROMER L.J. I also think that Eve J. arrived at a correct conclusion. In my opinion the scheme, which we have to consider in this case, cannot properly be described as a scheme of amalgamation. It does not result either in an amalgamation of the six corporations, or in an amalgamation of the six undertakings. I agree with what was said by Buckley J., in *In re South African Supply and Cold Storage Co.* (1) He said: " Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings." It must not be thought from that statement of Buckley J. that he in any way thought that an amalgamation of two undertakings was the same as an amalgamation of two companies. I think he was only intending to refer to the fact that, as the result of an amalgamation proper of two companies, there must be an amalgamation of the two undertakings. It is quite obvious that you can have an amalgamation of the undertakings of two companies without there being an amalgamation of the two companies. If one company sells its undertaking to another for cash, and the purchasing company thenceforward carries on its own undertaking and the purchased undertaking as one, without question there has been an amalgamation of the two undertakings. There has not been in that case an amalgamation of the two companies. I find some definition, if it be a definition, of "amalgamation" in Buckley on the Companies Acts, 11th ed., p. 487. It is a definition which, so far as it is a definition, I should like to adopt as my own; it is there stated as follows: "The word 'amalgamation' has no definite legal meaning. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company." Two companies can amalgamate, as one knows, in either of two ways: company A can sell its business and undertaking to company B in consideration of shares in company B. Company A than goes into liquidation and distributes the shares in company B amongst its shareholders, and the result of it all is that, whereas there were previously two corporations, A and B, corporation A has now become merged in corporation B. There is only one corporation carrying on one undertaking with one set of shareholders. Another way in which it is frequently done is that a third company, a new company, company C, is formed, and both the companies A and B sell their undertakings to company C in consideration of shares in undertaking C. The shares in A and B are then distributed amongst the shareholders by means of liquidation, and companies A and B cease to exist. As the result of the transaction there is now one corporation C in place of the former corporations A and B. There is one set of shareholders instead of two sets of shareholders, one undertaking instead of two undertakings.

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(1) [1904] 2 Ch. 287.

I need not go through the scheme in the present case. It is quite obvious from what the Master of the Rolls has said that as the result of that scheme there will not in future be one corporation instead of six corporations; there will not be one undertaking instead of six undertakings; there will not be one set of shareholders instead of six sets of shareholders, because each company will continue to carry

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on its business in its own name, and the shareholders in the six companies will now be different indeed from the shareholders previously existing, but they will be shareholders of six separate companies. There will not be a blending together of all the shareholders in the six companies.

It was said by Mr. Evershed, and I appreciate the force of his argument, that in the two methods, to which I have referred, of amalgamating two companies, there is a sale, that is to say, one company sells its undertaking, and he says if those be the only two forms of amalgamation it would be unnecessary for the Legislature to refer in this sub-s. 3 of s. 10 to an amalgamation of the company with another company, in addition to referring to the sale of all or any part of the property and undertaking of the company to another company. There appear to me to be two answers to that. The first is this, that the company may become amalgamated with another company, not by means of a sale, but by means of a purchase. Company A may purchase the assets of company B and the undertaking of company B in consideration of shares in company A, and that would not be covered by the sub-section relating to the sale of all or any part of the property and undertaking of the company to another company. It is true that in that case the trustee of shares in company A would not be called upon to take up anything in exchange, any new shares or additional shares, for the shares he already held in company A; but this fact does not show that such an amalgamation is not within the contemplation of the Legislature. A trustee, for instance, is given express power in this sub-section to concur, amongst other things, in the release, modification, or variation of any rights, privileges or liabilities attached to the securities, or any of them, but his concurrence in that would not necessarily result in any new shares or securities being acquired. The truth of the matter is that the power given to the trustees to concur includes a power of concurring by means of an exercise of the trustees' voting power. Therefore, if a scheme be put forward for the amalgamation of a company, in which a trustee holds shares, with another company to be carried out by means of a purchase of the company in which the trustee holds shares, the trustee may concur under the powers conferred upon him by this section by voting in favour of the scheme put forward.

I think there is this further to be observed, that an amalgamation may be carried out by means of a purchase by one company of all the shares in another company with which it is proposed to amalgamate. The purchase of the shares does not, by itself, result in an amalgamation. It may be a step towards amalgamation and amalgamation would, in such a case, eventually be brought about by the first company being put into liquidation by the company which has bought all its shares, or the large majority of its shares, and by the acquisition by the purchasing company of the undertaking of the first company. In that event there would be an amalgamation of the two corporations; there would be an amalgamation of the two undertakings. There would then be one set of shareholders and not two sets. That consideration is the answer, I think, also to the argument which was based upon the Finance Act of 1927. It is to be observed that s. 55, sub-s. 1, begins as follows, and is governed by these words: "If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say . . . . (*b*) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company"; then, if certain other conditions are shown, the relief in the matter of stamp duty is provided. If an acquisition by one company of all the shares in another company was equivalent to an amalgamation in the view of the Legislature, the Legislature certainly would not have said in this section: "If in connection with a scheme for the . . . . amalgamation of any companies it is shown";

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it would have contented itself, I should have thought, with saying: "If it is shown."

For these reasons, it seems to me impossible to say that there has been an amalgamation in the present case. In my opinion the scheme here lacks the really essential qualities of amalgamation, the essential quality being that which I have mentioned, of there being one corporation in the future instead of the six corporations, one undertaking instead of the six undertakings, one body of shareholders instead of the six bodies of shareholders. I agree that this appeal fails.

MAUGHAM L.J. I am of the same opinion. The question is the apparently simple question, at first sight, as to the true construction of s. 10, sub-s. 3 (*c*), of the Trustee Act, 1925. The Act is now some ten years old, which one is sometimes tempted to forget, and there have been quite a number of statutes passed which are said to show that the Legislature had taken a rather wide view of the meaning of the words in the sub-section to which I have referred—namely, the words "for the amalgamation of the company with another company." Strictly speaking, of course, one cannot construe that section by reference to anything in the Finance Act of 1927, or the Companies Act of 1929, but still, I think, one may fairly look to see how the Legislature does use the word "amalgamation," even in a later Act than the Trustee Act of 1925.

Prima facie I think it must be accepted, at any rate, it is, in my opinion, correct to say, that in the year 1925 "amalgamation" had, generally speaking, the meaning which is to be found in Buckley on the Companies Acts, 11th ed., p. 487. I accept, like my brother Romer, the view that the word "amalgamation" has no definite legal meaning; and I also accept the view that "it contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company." If that be right, the question here is whether there is, in this case, a scheme or arrangement for the amalgamation of the company with another company or companies; and you ask yourself whether, accepting the statement which I have read, there is anything to show that two companies are so joined as to form a third entity, or one company is absorbed into and blended with another. The answer is that there is not.

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I need not repeat the facts stated by the Master of the Rolls; it is sufficient to summarize the position by observing that the undertakings of the five companies are to be continued. Their liabilities will still remain the liabilities of the separate undertakings, and the debenture holders' position in the various companies is not to be affected. There will continue to be separate boards of directors, and I think there is really no possibility of saying, in accurate language, that there is a blending of any undertakings at all. What may be described as amalgamated or blended are the interests of the shareholders in the various concerns; in other words, I think, without gross inaccuracy, that this might be described as an amalgamation quoad the interests of the shareholders. But the section we are dealing with speaks of a scheme for the amalgamation of the company with another company. On the view I take as to the meaning of the word as generally understood, there is nothing of that kind; but I agree with the earnest argument that has been addressed to us on behalf of the appellants that it might be that there could be found something in the general frame, or the context, of s. 10, sub-s. 3, of the Trustee Act, 1925, which might lead the Court to give to the word in sub-s. 3 (*c*) a popular and, as I think, a somewhat inaccurate meaning.

The first point, and, perhaps, I may say, the main point, upon which Mr. Evershed urges us to take that course, is founded upon the fact that the trustees are being authorized under sub-s. 3 to concur in a scheme or arrangement—"(*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company"; and (*c*), the material clause, "for the amalgamation of the company with another company." He says that if you read that clause as combined

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with the words that the trustees are to have power "to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities," you will find that "amalgamation" must have the more general meaning which he says should be attributed to it. To my mind, there are two answers to that argument. The first is that I am not sure that clauses (*b*) and (*c*) in the sub-section are necessarily exclusive. I think it is quite sufficient to explain cl. (*c*) to say that the draftsman, or, to put it in other words, the Legislature, may have thought that there were possibly amalgamations, such as the section refers to, which would not be properly described as within cl. (*b*), which refers to the sale of all or any part of the property and undertaking of the company to another company. I would observe, though I do not lay much stress upon it, that there might be an amalgamation under s. 154 of the Companies Act, 1929, which would not involve, I think, such a sale as I have mentioned, and yet there would be, by the direction of the Court, a dissolution possible without winding up of the transferor company, and provisions for the appropriation by the transferee company of shares and other like interests which are to be allotted or appropriated to or for any person. Apart from that, there are the reasons which my brother Romer has given, and I would add one more, that there might be an amalgamation properly so-called by private Act of Parliament.

Accordingly, I do not myself attribute very much weight to the contention that you will find that the phrase "amalgamation of the company with another company" must necessarily involve the case where shares are to be acquired in the other company by the shareholders in the company which is primarily concerned. I think we have to answer this question: Can an acquisition of shares by a holding company properly be described as an amalgamation of the company whose shares, or a controlling interest therein, are being acquired by the holding company? For my part, I must answer that in the negative. It is material to remember that there is no warrant for limiting cl. (*c*) to a case where there is to be an acquisition of not less than 90 per cent. of the share capital of the company in which the securities are subject to the trust. Apparently, the mere acquiring of a controlling interest would have to be regarded, according to the view of the appellants, as resulting in an amalgamation. For my part, I do not believe there is any warrant for so wide an extension of the sentence.

In s. 55 of the Finance Act, 1927, a section not too easy to construe and which has been the subject of three decisions in the King's Bench Division [(*Murex, Ld.* v. *Inland Revenue Commissioners* (1); *Brotex Cellulose Fibres, Ld.* v. *Inland Revenue Commissioners* (2); *Tillotson* (*Oswald*) *Ld.* v. *Inland Revenue Commissioners* (3)) and there is also one in the Court of Appeal which will be reported, I suppose, in a month or two] language is used which certainly points to the fact that the Legislature has used the word "amalgamation" as though it included in that case a scheme for the acquisition of not less than 90 per cent. of the shares to be acquired by the transferee company in the existing company. The section, in other words, upon its true construction, explains quite clearly, or with reasonable clearness, what in the statement of conditions (*a*), (*b*) and (*c*) in sub-s. 1 the Legislature is dealing with, and what conditions have to be observed, and, I may add, strictly observed, in order that there may be the exemption from stamp duty with which the section is dealing. The argument on behalf of the appellants is, at any rate, double-edged, for it would have been quite easy, in s. 10 of the Trustee Act, 1925, to add the phrase "for the amalgamation of the company with another company" some such words as are to be found in s. 55, sub-s. 1 (*c*) and sub-s. 2, of the Finance Act, 1927. They are not to be found there.

In the argument for the appellants I do not think it was suggested that the acquisition of shares by a holding company in a single other company can properly be described as an amalgamation of that company with a holding company.

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(1) [1933] 1 K. B. 173.
(2) [1933] 1 K. B. 158.
(3) [1933] 1 K. B. 134.

What was said was that if there are a number of subsidiary companies whose shares are being acquired by a holding company, you can then say that each subsidiary company is amalgamated with each other subsidiary company; but it is to be noted that, although the singular would include the plural, you have to make the sub-section we are considering, namely, a scheme "for the amalgamation of the company with another company," apply if there is only a single company which is being amalgamated with the other company. It seems to me impossible to say, if the whole transaction consists of certain shares in another company being acquired by a holding company (the controlling interest, I will assume, being acquired by the holding company) that that alone involves an amalgamation.

Accordingly, in my opinion, for the reasons given by my brethren and by Eve J., it is not possible here to say that the scheme with which we are dealing is one for the amalgamation of the company with another company, and the appeal must fail.

Appeal dismissed.

Solicitors: *Slaughter & May; Attenboroughs.*

W. I. C.

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[1934. R. 155.]

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Jan. 14; April 1.

Vendor and Purchaser—Freehold land—Restrictive Covenants—Building Scheme—Sale of plots by Owners in common to one of themselves—Restrictive covenants by Grantee with Grantors—Subsequent sales by Grantee—Rights of Purchasers inter se—Validity of original Grantee's and Grantors' Covenants—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 82.

In 1904, three persons B., H. and S. were the tenants in common in fee simple of certain land intended to be laid out in plots as a building estate. After several sales had taken place, the remainder of the land was in 1906 offered for sale by auction subject to certain stipulations, one of which was that every purchaser should covenant with the vendors, and so that every person for the time being entitled to any estate in the lands should have a right to the observance of such stipulations so far as they related to the covenantors' property or plot or plots as follows—namely (inter alia) that not more than two dwelling-houses should be erected on any one plot.

None of the property was sold at this auction, but in February, 1907, B., H. and S. (the vendors) sold to one of themselves—namely, B., Lots 23, 24 and 25, and 45 to 51 inclusive. These lots were conveyed by two separate conveyances each dated February 20, 1907. The habendum in each conveyance to B. was in each case to be, "subject nevertheless to the . . . . covenants by the purchaser (i.e., B.) hereinafter contained." These were in each case as follows: "The purchaser . . . . doth hereby for himself . . . . covenant with the vendors . . . . (owners for the time being of any of the lands now or formerly part of the vendors' estate of which the said hereditaments form part and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of the stipulations in Part II of the second schedule so far as they relate to the said hereditaments . . . . hereby granted) that the stipulations last aforesaid shall be observed so far as they relate to the hereditaments last aforesaid."

This Part II contained (inter alia) the covenant referred to as one of the stipulations in the above mentioned conditions of sale.

In July, 1907, B., H. and S. sold to the plaintiff part of the property offered for sale by auction in 1906—namely, Lot 26 and part of Lot 27. The plaintiff covenanted with the vendors to perform and observe certain stipulations therein set out which were (inter alia) similar to those in the particulars and conditions above referred to in the abortive sale by auction in 1906.

Further lots were subsequently sold by B., H. and S. to various purchasers.

In 1933, B. agreed to sell part of Lot 25 (the remainder having been previously disposed of) to the defendant, and the land was duly conveyed without any reference to the stipulations sought to be imposed by the conveyance to B. in February, 1907.

The defendant having commenced to erect four houses on his plot of land, the plaintiff began an action for an injunction to prevent him from erecting more than two houses, and for damages.

Held, (1.) on the question whether a building scheme existed when the plaintiff purchased his land in July, 1907, and if so, to what land it related; that as regards the covenants contained in the conveyance by B., H. and S. to B. alone in February, 1907, although they were in form with B., H. and S. jointly, and although each of the covenantors had at that time a separate interest in the land retained, it was not possible to treat them as joint and several, and they were therefore void and unenforceable at the time they were entered into.

It followed therefore that no restrictive covenants were in existence relating to any part of the land offered at the 1906 auction at the date when the plaintiff purchased his plots in July, 1907; and as no subsequent covenants were entered into, no building scheme ever therefore came into existence, and

(2.) That there was nothing in s. 82 of the Law of Property Act, 1925, which would enable the court to hold that what was insufficient to create a scheme in 1907 must by virtue of the section be deemed from January 1, 1926, to have constituted a building scheme as from the earlier date or any intermediate date.

The action therefore failed.

ACTION.

In this action the plaintiff (who was the owner of some freehold land, Lot 26 and part of Lot 27 on a building estate, which by virtue of certain conditions of sale was subject to covenants restrictive of its user entered into by the plaintiff when he purchased it), claimed (inter alia) a declaration that the defendant as owner and occupier of Lot 25 on the estate plan of the same building estate (which lot practically adjoined the plaintiff's plots of land) was bound by a building scheme. In particular he claimed that the defendant was bound in the conveyance of Lot 25 by certain covenants by which the defendant's vendor was himself bound under a sale by the vendor and two others as tenants in common to himself (the defendant's vendor); and which were similar to those which he (the plaintiff) had entered into with regard to his plots; and which covenants he alleged also bound the defendant's land. The plaintiff alleged that when the defendant had purchased Lot 25 he had taken it subject to the same covenants

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which his (the defendant's) vendor had entered into, and which covenants were contained in the same particulars and conditions of sale to which the plaintiff's plots were subject; and which included and bound the whole building estate.

The defendant in his defence stated that the property in question was conveyed to him not subject to any covenants or restrictions, and he refused to admit that he purchased with notice of a building scheme. He further stated that his vendor had guaranteed that any restrictions affecting the land had ceased to apply.

The material facts are more fully set out below in the judgment of the learned judge.

G. D. Johnston for the plaintiff.

C. E. Harman for the defendant. No building scheme exists: see *Osborne* v. *Bradley* (1), and compare *Elliston* v. *Reacher.* (2) Even, however, if there should be such a scheme, the plaintiff can derive no assistance from s. 82 of the Law of Property Act, 1925. (3)

[He referred to *Ellis* v. *Kerr* (4); *Renals* v. *Cowlishaw* (5); *In re Nisbet and Potts' Contract.* (6)]

[LUXMOORE J. referred to *Spicer* v. *Martin.* (7)]

See also *Reid* v. *Bickerstaff.* (8)

G. D. Johnston in reply. A building scheme was in contemplation and existed as regards this estate. As to the covenants by Betts with himself and others, they are joint

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(1) [1903] 2 Ch. 446.

(2) [1908] 2 Ch. 374.

(3) Law of Property Act, 1925, s. 82, sub-s. 1: "Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone."

Sub-s. 2: "This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before such commencement."

(4) [1910] 1 Ch. 529, 533.

(5) (1878) 9 Ch. D. 125.

(6) [1905] 1 Ch. 391.

(7) (1888) 14 App. Cas. 12.

(8) [1909] 2 Ch. 305, 319.

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and several: see *Withers* v. *Bircham.* (1) As regards the application of s. 82 of the Law of Property Act, 1925, see the note in Wolstenholme and Cherry's Conveyancing Statutes, vol. i., p. 364.

C. E. Harman for defendant on further question of the application of s. 82 of the Law of Property Act, 1925. The effect of this section of the Act was not to create a building scheme not existing at the end of 1925. On the point whether the covenant was a several and not a joint covenant, see *Boyce* v. *Edbrooke.* (2)

Cur. adv. vult.

1935. April 1. LUXMOORE J. This action has been brought for a declaration that the defendant, as owner and occupier of certain land at Purley in the county of Surrey, is bound by a building scheme, and for ancillary relief, including an injunction to restrain him from building upon the land more than two dwelling-houses with the appropriate stables, outbuildings and offices. The defendant denies the existence of a building scheme and says that, if contrary to his submission there is such a scheme, the plaintiff has by his conduct deprived himself of the right to enforce it. He also says that the plaintiff has not suffered and will not suffer anything beyond nominal damages if more than two dwelling-houses should be built on the land.

There is no dispute of fact except on the question of damage. The material facts are as follows. By a deed dated May 4, 1903, John Porteous Maley conveyed to Edward Hall, Edward James Sole and Harry Tom Freeman in fee simple as tenants in common, 19 acres 3 roods and 9 perches of land situate in the parish of Coulsdon, bounded on or towards the north-east by a road called The Higher Drive, on or about the south-west by a road called Old Lodge Lane, on or towards the north-west by land in the occupation of the Reedham Orphanage, and on or towards the south-east by land then or lately belonging to one Alfred Densham. The land is delineated on a plan drawn on the conveyance. The

(1) (1824) 3 B. & C. 254. (2) [1903] 1 Ch. 836.

conveyance carried into effect an agreement for sale and purchase. Messrs. Hall, Sole & Freeman subsequently sold the property comprised in the conveyance of May 4, 1903, to Mr. Frederick Betts, the said Mr. Edward Hall and the said Mr. Edward James Sole, and it was conveyed to them in fee simple as tenants in common by a conveyance dated February 10, 1904. Between the date of this conveyance and October 4, 1906, Messrs. Betts, Hall & Sole sold and conveyed certain parts of the land comprised in the conveyance of February 10, 1904, to various purchasers. The purchaser in each case was one or other of the vendors, Messrs. Betts, Hall & Sole. No restrictions were imposed on any of these sales. On October 4, 1906, the rest of the land comprised in the conveyance of February 10, 1904, then remaining unsold, was offered for sale by auction, subject to certain conditions which were attached to the particulars of sale. The property was described in the particulars as being "a valuable freehold building estate, comprising three freehold detached residences, and 51 freehold building plots, situated on the Reedham Park Estate, Purley, Surrey." The plan attached to the particulars comprised the unsold land, included in the conveyance of February 10, 1904, lying between Higher Drive and Reedham Road. The last named road is on the site of the Old Lodge Lane shown on the plan on the conveyance of May 4, 1903. The sale plan also shows the property as intersected by two roads running more or less at right angles to Higher Drive and Reedham Road. The fifty-one lots offered for sale are coloured pink on the sale plan and are numbered consecutively from 1 to 51 inclusive, while the three freehold residences are shown on the plan and are also coloured pink and are numbered 52, 53 and 54 respectively.

The conditions of sale so far as material to this action provided as follows :—Condition 14 : "The property, or every lot of property, is sold and shall be conveyed subject to the following stipulations, and every purchaser shall covenant with the vendors their and each of their heirs, executors, administrators, and assigns, owners for the time being of any of the lands now or formerly part of the vendors' estate of which the same form part, for the observance thereof, and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of such stipulations so far as they relate to such covenantors property or lot or lots, viz.:—No lands shall be used or have any buildings erected thereon save for the purposes of private residences and stables, outbuildings, offices, and gardens, suitable and adapted for use therewith. In the event of a sale in Lots, ..., not more than two dwelling-houses with such stables, outbuildings, and offices, shall be erected on any one plot. No such dwelling-house henceforth erected shall (exclusive of such offices, outbuildings, and stables, as aforesaid) be of less value, in prime cost of labour and materials at lowest current prices, than as follows, namely: In the case of houses fronting Higher Drive for each detached house 700*l.* and for a pair of semi-detached houses 1200*l.*; and in case of houses fronting any other road for each detached house 500*l.* and for a pair of semi-detached houses 800*l.* Nothing shall be done or permitted which shall be a nuisance, or damage, or annoyance to the neighbourhood, or any person resident, or owning property therein. Every purchaser shall forthwith erect and afterwards maintain a good and sufficient boundary fence or wall upon the frontage, and also on the side of the property (or of his lot) as marked, 'T,' within the boundary. Nothing other than bow windows or other architectural dressings, or a front boundary wall or fence, shall be erected between the building lines shown on the sale plan and the road. Provided always:—(*a*) The vendors reserve the right as between themselves and any purchaser, and the owner or owners for the time being of any part of the estate at any time hereafter to alter, modify, release, or dispense with any of the stipulations aforesaid, and to lay out or deal with the estate or any lot or lots not sold in such manner as they, or any, or either of them shall think fit. (*b*) No purchaser shall be personally liable in respect of any breach or non-performance of any of these covenants occurring after he shall have parted with all ownership of his plot or plots. (*c*) The said covenant on the part of every purchaser shall be framed so as to give effect to clauses (*a*) and (*b*)."

None of the property offered for sale at the 1906 auction was sold on that occasion, but on February 20, 1907, Frederick Betts, Edward Hall and Edward James Sole sold to Frederick Betts certain parts of the property which comprised Lots 23, 24 and 25, and Lots 45 to 51 inclusive at that auction. These lots were conveyed by two separate conveyances each dated February 20, 1907, and made between the said Frederick Betts, Edward Hall and Edward James Sole of the one part and the said Frederick Betts of the other part. Each of these conveyances is in the same form. The habendum in each case is expressed to be "subject nevertheless to the obligations or liability aforesaid and to the covenants by the purchaser" (that is Mr. Frederick Betts) "hereinafter contained." The obligations or liability mentioned were or was in respect of the repair of Higher Drive and the maintenance of certain fences in that road. The covenants by the purchaser are in each case in these words: "The purchaser (but as to the stipulations set out in Part II. of the second schedule hereto not so as to bind himself personally after he shall have parted with all ownership of the said hereditaments) doth hereby for himself his heirs and assigns covenant with the vendors their and each of their heirs executors administrators and assigns (owners for the time being of any of the lands now or formerly part of the vendors' estate of which the said hereditaments form part and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of the stipulations in Part II. of the said second schedule so far as they relate to the said hereditaments hereinbefore expressed to be hereby granted) that the stipulations last aforesaid shall be observed so far as they relate to the hereditaments last aforesaid. . . . . Provided nevertheless that as between the vendors and the purchaser and the owner or owners for the time being of any part of the said estate the vendors shall be at liberty at any time hereafter to alter modify release or dispense with any of the stipulations set out in Part II. of the said second schedule hereto and to lay out or deal with the remainder (or any part thereof) of the said estate in such manner as they or any or either of them shall think fit." The second part of the schedule contains stipulations similar to those set out in condition 14 of the conditions of sale.

It is to be observed that the covenants contained in these conveyances were entered into by Mr. Frederick Betts on the one hand and Mr. Frederick Betts and the other two vendors on the other. A question therefore arises as to their validity. I propose to deal with this later.

On July 6, 1907, Edward Hall, Edward James Sole and Frederick Betts conveyed to the plaintiff, Eustace Ridley, a further part of the property offered for sale at the 1906 auction. The part so conveyed is described in the conveyance as "All that piece or parcel of land situate on the north-west side of the Burcott Road leading out of Higher Drive at Purley in the County of Surrey which said piece or parcel of land has a frontage on the south-east side thereof to the said Burcott Road of sixty feet and contains on the north-east and south-west sides thereof a depth of one hundred and seventy feet and measuring in width at the rear thereof sixty feet and which is distant from the Higher Drive aforesaid about two hundred and ten feet computed from the south-east corner thereof which said hereditaments are more particularly described in the plan drawn on the second page of these presents and are thereon coloured pink and numbered Lot 26 and part of 27." The property in fact comprised Lot 26 and also a part of Lot 27 shown on the sale plan to which I have already referred. The plaintiff entered into a covenant in this form: "The purchaser hereby covenants with the vendors their and each of their heirs executors administrators and assigns owners for the time being of the lands now or formerly a part of the vendors' estate of which the hereditaments hereby conveyed form part and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of the stipulations hereinafter mentioned so far as they relate to his property or lot or lots that the purchaser his heirs and assigns will henceforth perform and observe the stipulations mentioned in the first schedule hereto to the intent and so that the said stipulations shall be binding on the said lands and premises hereby assured into whosesoever hands the same may come but not so as to render the purchaser personally liable in damages for any breach thereof after he shall have parted with his interest in the premises." The first schedule contained stipulations similar to those set out in condition 14 of the conditions of sale, including the proviso reserving the right to the vendors to alter, modify, release or dispense with any of the said stipulations, and to lay out or deal with the estate or any lot or lots not sold in such manner as they or any or either of them should think fit.

Before this conveyance was executed, the plaintiff and his solicitors were informed that Mr. Frederick Betts had purchased a part of the same estate, subject to the same restrictions as were to be imposed in respect of the land which the plaintiff was then purchasing. If the plaintiff and his advisers had inquired into the position, they would have ascertained or ought to have ascertained that a question arose as to the validity of this covenant.

After the conveyance to Mr. Frederick Betts but before the execution of the conveyance in favour of the plaintiff, Messrs. Hall, Sole & Betts executed a memorandum of deposit of title deeds in favour of the London & County Banking Co., Ld., to secure the repayment of all moneys for the time being owing to the bank from the partnership firm of Messrs. Sole, Hall & Betts. The documents deposited included the conveyances of May 27, 1902, May 4, 1903, and February 10, 1904.

No further part of the property was sold until December 24, 1908. On that date the London & County Banking Co., Ld., with the concurrence of Messrs. Sole, Hall & Betts, sold and conveyed to Messrs. Charles William Payne and Arthur Ingram a further part of the property offered for sale at the 1906 auction. The part of the property so conveyed comprised Lots 9 to 22 inclusive, the remainder of Lot 27 (being the part of that lot not sold to the plaintiff on July 6, 1907), and Lots 28 to 40 inclusive at that auction. The conveyance to Messrs. Payne & Ingram was not made subject to any stipulations or restrictions of any kind. It appears that before this conveyance was executed the property comprised in it, together with other property forming the rest of the property offered at the 1906 auction, was offered for sale by auction on November 19, 1908, in three lots, and that the property conveyed by the conveyance of December 24, 1908, formed Lot 2 at that sale. No mention was made in the particulars or conditions of sale of any restrictions or stipulations affecting the property or any part of it, and the conveyance of December 24, 1908, is not expressed to be subject to any restrictions or stipulations, nor did Messrs. Payne & Ingram purport to enter into any covenants or stipulations restrictive of such user. On May 6, 1909, the rest of the property offered for sale at the 1906 and 1908 auctions, then remaining unsold, was offered for sale by auction under an order of the Chancery Division of the High Court of Justice, made in an action between Messrs. Sole & Hall as plaintiffs against Frederick Betts as defendant. The property was offered in two lots without any restrictions or stipulations. It appears from a memorandum endorsed on the conveyance of February 10, 1904, to which I have already referred, that that part of the property which formed Lot 2 at the 1909 auction and Lots 41 to 44 inclusive at the 1906 auction were sold and duly conveyed to Sir David Burnett in fee simple. I am informed that this conveyance was free from any restrictions or stipulations. On December 7, 1915, a small part of the land comprised in Lot 23 at the 1906 auction was conveyed to the plaintiff by Mr. Betts and his then mortgagee. No mention is made in this conveyance of the restrictions sought to be imposed in respect of Lots 23, 24 and 25 by the conveyance of February 20, 1907. On January 7, 1921, the remaining part of Lot 23 was conveyed by Mr. Betts to Thomas Charles Mansfield. The habendum in this conveyance is expressed to be " subject nevertheless to the stipulations and exceptions contained in the schedules to the indenture of conveyance dated February 20, 1907, ..., so far as the same are still subsisting and capable of affecting the premises" thereby assured. On September 15, 1924, Mr. Betts conveyed to Percy Edward Ridley, the brother of the plaintiff, the land comprised in Lot 24 at the 1906 auction, with a narrow strip facing part of and situate at the rear of the land comprised in Lot 25 at the same auction. No reference is made in this conveyance to the restrictions and stipulations contained in the conveyance of February 20, 1907, but, in answer to a requisition made on behalf of Mr. P. E. Ridley, before the conveyance, whether the stipulations and exceptions contained in the last mentioned indenture had been observed, Mr. Betts' solicitors replied that they knew of no breach.

On December 8, 1933, Mr. Betts agreed to sell the rest of the property comprised in Lot 25 at the 1906 auction to the defendant, Henry William Lee. The agreement contained a statement that the property was or may have been formerly subject to certain stipulations as to building or otherwise and provided: "The purchaser has notice thereof and shall not make any objection or requisition with regard thereto but the vendor guarantees that these stipulations have ceased to apply to the property sold and in the conveyance to the purchaser the land shall not be conveyed as subject to them." In compliance with this provision the property was conveyed on December 22, 1933, by Mr. Betts to the defendant without any reference to the stipulations or restrictions sought to be imposed by the conveyance of February 20, 1907. Shortly after December 22, 1933, the defendant lodged with the Coulsdon and Purley Urban District Council plans of four houses proposed to be erected on the land comprised in the conveyance of December 22, 1933. Three of these houses were in course of erection at the date when the writ was issued, and the foundations of the fourth house were excavated or being excavated. The plaintiff issued the writ in this action on January 20, 1934.

The first question to be determined is whether any building scheme was in existence when the plaintiff purchased the land comprised in and conveyed by the conveyance of July 6, 1907, and, if so, to what land does it relate. There can, I think, be no doubt but that at the time of the 1906 auction the then owners of the whole property laid it out with the intention of developing it as a building estate, subject to restrictions intended to be imposed on all the lots into which they proposed to divide it. The restrictions were consistent only with a general scheme of development, and I do not think that the fact that the vendors reserved a wide power to alter, modify, release or dispense with the restrictions is by itself sufficient to negative this view. Nothing, however, was sold at the 1906 auction.

Both the conveyances of February 20, 1907, contain what purports to be covenants by Mr. Betts in accordance with the scheme enunciated in the 1906 particulars and conditions of sale. In form these conveyances were made upon the footing that the restrictions were entered into for the benefit of the other lots intended to be included in that scheme. The conveyance to the plaintiff on July 6, 1907, was made on the same footing, and, assuming that the covenants by Mr. Betts in the two conveyances were valid, it seems to me that Mr. Betts and those claiming under him as well as the plaintiff could in equity have enforced the restrictions in respect of the lands included in the conveyances—namely, Lots 23, 24, 25, 26 and part of 27 and Lots 45 to 51 inclusive, although the scheme was, under the general power reserved to the vendors, abandoned so far as the rest of the land was concerned.

A serious question, however, arises by reason of the fact that the covenants in the two conveyances of February 20, 1907, were entered into by Mr. Betts with himself and two other persons. The covenants are in form with Messrs. Betts, Hall & Sole jointly and, although each of the covenantors had at that time a separate interest in the land retained, it is impossible to treat the covenants as joint and several, as it was suggested by Mr. Johnston could be done on the authority of the decision in *Withers* v. *Bircham* (1), for a covenant with Messrs. Hall and Sole alone would not create the necessary mutual obligation binding upon the whole interest in the land conveyed and that retained.

(1) 3 B. & C. 254.

In my judgment the covenants in the conveyances of February 20, 1907, were void and unenforceable at the time they were entered into: see *Ellis* v. *Kerr*. (1) It follows from this that there were no restrictive covenants in existence relating to any part of the land offered at the 1906 auction at the date when the plaintiff purchased Lot 26 and part of Lot 27, and, as no subsequent covenants were entered into, no building scheme ever came into existence.

It is said, however, that any defect in the covenants entered into by Mr. Betts in 1907 has been cured by the provisions of s. 82 of the Law of Property Act, 1925. This section is as follows: "(1.) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone. (2.) This section applies to covenants or agreements entered into before or after the commencement of this Act, ... but without prejudice to any order of the court made before such commencement." It was argued that the effect of this section is to constitute as from January 1, 1926, a valid and enforceable building scheme in respect of Lots 23, 24, 25, 26, and part of Lot 27, and Lots 45 to 51 inclusive, although such building scheme had in law no existence in July, 1907, or at any time between that date and January 1, 1926. I am unable to accept this view. It may well be that, if Messrs. Hall and Sole were now seeking to enforce the covenants in the conveyances of February 20, 1907, against Mr. Betts, they would be entitled to do so by reason of the express provisions of the section in question; and that to enable them to do so the covenant would be construed as having been entered into with them alone and not with them and Mr. Betts. But this is not such an action. As already pointed out, if the covenant had in the first instance been entered into between Mr. Betts on the one hand and Messrs. Hall and Sole on the other, it would not have enured for the benefit of the whole of the interests in the land retained; because Messrs. Hall and Sole were only two out of three tenants in common, and covenants in such form would not have created that mutuality of obligation which is the essential ingredient for the enforcement of a building scheme by one purchaser from the common vendors against another purchaser from them; see *Elliston* v. *Reacher*. (1)

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(1) [1910] 1 Ch. 529.

I am satisfied that there was no building scheme on July 6, 1907, affecting the property now vested in the defendant jointly with that belonging to the plaintiff, and that there is nothing in s. 82 of the Law of Property Act, 1925, which compels me to hold that what was insufficient to create such a scheme in 1907 must by reason of that section be deemed, from January 1, 1926, to have constituted a building scheme as from the earlier date or from any intermediate date.

In these circumstances I do not think it necessary to consider the conflicting evidence whether any and what damage might have been suffered by the plaintiff if I had held that there was in fact a building scheme binding the land of the plaintiff or defendant, or whether the plaintiff had by acquiescence or otherwise debarred himself from enforcing any such scheme.

In the result I dismiss the action and order the plaintiff to pay the defendant's costs.

Solicitors: *Joynson-Hicks & Co.; Ward & Melliar Smith.*

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(1) [1908] 2 Ch. 374, 385.

A. R. T.

Considered. *In re* ADAMS, DECD. [1951] 1 Ch. 716

LUXMOORE

1935
April 11, 12, 15.

In re BROMAGE.

PUBLIC TRUSTEE *v.* CUTHBERT (INFANT) AND OTHERS.

[1934. B. 2107.]

Legitimacy—Husband and Wife—Separation Deed—Spouses living apart—Wife's association with other men—Subsequent birth of children—Doubt as to Paternity—Registered as children of differently named persons—Whether Husband could be the Father—Access—Rebuttal of prima facie Presumption of Legitimacy—Evidence—Principles followed.

If a husband and wife are not living together but are living separate and apart under a separation deed, the presumption of the legitimacy of children of a married woman born while the marriage is still continuing is not thereby rendered inapplicable. If therefore the wife gives birth to children while the separation continues, these children will prima facie be legitimate. To rebut the presumption of legitimacy, proof of absence of sexual intercourse between the husband and wife at the material time must be conclusive.

A husband and wife having entered into a separation deed, agreed to live separate and apart. They separated, and at all material times lived apart on terms of estrangement and hostility. Some time after the deed of separation had been entered into and while so living apart, the wife, who was then living with E. H., gave birth to a child. This child was registered as the child of E. H. and the wife. There was no evidence that the husband knew of the existence of this child but it was proved that he was never asked to provide for it or acknowledge it in any way. Some years afterwards another child was born while the wife was living with A. A. and was registered as the child of A. A. and the wife.

A question having arisen whether these children might be entitled under the terms of a gift in a will for all the children of the husband and the wife on their attaining twenty-one or in the case of daughters on marriage, an originating summons was taken out for the purpose (inter alia) of determining this question.

Held, that both children were according to the evidence illegitimate and not entitled to the gifts in question.

Mart v. *Mart* [1926] P. 24 not followed.

The principles laid down in *Morris* v. *Davies* (1837) 5 Cl. & Fin. 163; *The Aylesford Peerage* (1885) 11 App. Cas. 1, and *Banbury Peerage Case* (1811) 1 Sim. & St. 153 considered and applied.

ORIGINATING SUMMONS.

These proceedings were commenced by the Public Trustee for the purpose of determining (inter alia) the question whether

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two of the defendants, namely Dene Horton and Clive Arthur Aubrey (both infants), were entitled contingently on their respectively attaining twenty-one to share with the two first named defendants—namely, Heather Gordon Cuthbert and Ian Reid Cuthbert (also both infants), in certain trust funds bequeathed by the will of Sarah Ann Bromage deceased to the plaintiff in trust after the death of Margaret Nora Cuthbert and also after the death of Archibald Cuthbert for all the children of the said Margaret Nora Cuthbert and her husband the said Archibald Cuthbert who being sons should attain twenty-one or being daughters should attain that age or marry.

The facts were shortly as follows :—

Margaret Nora Cuthbert was married on October 29, 1910, to Archibald Cuthbert. Four children of the marriage were born before June 6, 1921—namely, the defendants Heather Gordon Cuthbert and Ian Reid Cuthbert, and two others who died in early infancy. On June 6, 1921, a deed of separation was executed by the husband and wife by which it was agreed that the wife should live separate and apart from her husband and free from his marital control and authority, and that she should be at liberty to reside at such place as she might think proper. No proceedings for divorce had been instituted at this date nor were any proceedings of that nature subsequently launched. The deed of separation did not contain any clause limiting the provision thereby made for the wife to such period as she remained chaste.

Two children were born to the wife after the date of the separation deed. The first was born on March 2, 1922. This child was, as appeared from the birth certificate, registered as Dene Horton. His father's name was there stated to be Ernest Albert Gladman Horton while the mother's name was given as Margaret Nora Cuthbert, formerly Bromage. The informants in respect of the birth were stated to be E. A. G. Horton, father, and M. N. Cuthbert, mother. This child was the defendant Dene Horton. The other child was born on May 25, 1929. The birth certificate stated the child's name as Clive Arthur, that the father's name was Henry

Arthur Aubrey and the mother's name was Margaret Nora Cuthbert, formerly Bromage. The informants were stated to be H. A. Aubrey, father, and M. N. Cuthbert, mother. This child was the defendant Clive Arthur Aubrey.

Margaret Nora Cuthbert died on October 26, 1933. By the will of her mother, the said Sarah Ann Bromage, who died on May 3, 1919, certain provisions were made, as above stated, for the children of the said Margaret Nora Cuthbert and also for the children of the said Archibald Cuthbert. Evidence adduced in the case and further facts are stated in the judgment of the learned judge.

H. Johnston for the plaintiff.

J. V. Nesbitt for the defendants Heather G. Cuthbert and Ian Reid Cuthbert. The whole of the evidence adduced in this case and the correspondence produced shows the extreme improbability that the husband of Margaret N. Cuthbert could have had intercourse with his wife since the date of the deed of separation. The facts are overwhelmingly against the presumption of the legitimacy of the two defendants D. Horton and Clive A. Aubrey. These two last named defendants are therefore not entitled under the will of Sarah A. Bromage.

[He referred to *The Aylesford Peerage* (1) and *Banbury Peerage Case.* (2)]

Hon. B. L. Bathurst for the defendant Dene Horton. The fact that the husband and wife were living apart on terms of hostility after the date of the deed of separation cannot necessarily be relied on to prove the illegitimacy of this defendant if there is reasonable evidence of access. If it can be shown that there was a reasonable probability of sexual intercourse between the husband and wife, then direct and positive evidence must be brought to rebut the usual presumption of legitimacy. In this case a doubt exists which assists this defendant.

J. L. Stone for the defendant Clive Arthur Aubrey. There is a prima facie presumption that a child is legitimate if

(1) 11 App. Cas. 1.

(2) 1 Sim. & St. 153.

evidence of access is proved; and this presumption is not necessarily rebutted by the fact—as is the case here—that the husband and wife were not living together but were living apart by virtue of this deed of separation. If the access is proved—and the evidence here shows that access was not at all improbable—then the original presumption revives, and it requires very strong evidence to disprove it. The case of *Mart* v. *Mart* (1) is, it is submitted, not correct and not in accordance with previous authorities. See *Morris* v. *Davies* (2), the facts of which case are distinguishable from this case. A separation deed is not equivalent to a legal decision: *Russell* v. *Russell.* (3)

There is very strong evidence that, in the case of the doubt regarding this defendant, the husband was in the habit of visiting the wife when he knew she was living with another man. He used to spend some time in the house, and of course the opportunity of sexual intercourse was not improbable and must have arisen. Compare *Hetherington* v. *Hetherington.* (4) The fact that another man has had intercourse with the wife is not a material consideration, it does not affect the legal inference: *Bury* v. *Phillpot.* (5)

[The following cases were also referred to: *Gordon* v. *Gordon* (6); *The Aylesford Peerage* (7); *Banbury Peerage Case.* (8) Reference was also made to Selwyn's Abridgment, 13th ed., vol. i., p. 673; Taylor on Evidence, 12th ed., vol. i., pp. 102, 103, §106.]

LUXMOORE J. [His Lordship, after stating the facts as above set out, continued:] The question which I have to determine is whether the two defendants, who are known as Dene Horton and Clive Arthur Aubrey, or either of them, are in law the legitimate children of Margaret Nora Cuthbert and Archibald Cuthbert, and as such entitled to participate in the benefits given by Sarah Ann Bromage to the children of Margaret Nora Cuthbert and to the children of Archibald Cuthbert.

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(1) [1926] P. 24.
(2) 5 Cl. & Fin. 163.
(3) [1924] A. C. 687.
(4) (1887) 12 P. D. 112.
(5) (1834) 2 My. & K. 349.
(6) [1903] P. 141.
(7) 11 App. Cas. 1.
(8) 1 Sim. & St. 153.

It is well settled that every child born of a married woman during the subsistence of the marriage is prima facie legitimate. This presumption, however, is not one juris et de jure, and therefore can be rebutted by evidence of circumstances proving the contrary: see the first answer of the judges in the *Banbury Peerage Case.* (1) The presumption does not arise where the child is born after a decree of divorce, because in such case the marriage is no longer subsisting when the birth takes place. Nor does it arise where the parties are living apart under a decree for judicial separation: see *Hetherington* v. *Hetherington* (2), or under an order of a court of summary jurisdiction: see *Andrews* v. *Andrews and Chalmers.* (3) The ground for the exception where there is a decree for judicial separation appears to be statutory, for it was provided by s. 16 of the Matrimonial Causes Act, 1857, now replaced by s. 185 of the Supreme Court of Judicature (Consolidation) Act, 1925, that a sentence of judicial separation should have the effect of a divorce *a mensa et thoro* under the existing law. A similar basis also appears to exist in the case of a separation under an order of a court of summary jurisdiction: see the Summary Jurisdiction (Married Women) Act, 1895, s. 5.

It is said that the execution of a separation deed where the parties are living apart under its provisions has the same effect as a decree for judicial separation or an order of a court of summary jurisdiction, and that in such a case the presumption has no application. In support of this contention reliance is placed on the decision of Bateson J. in *Mart* v. *Mart.* (4) With all respect to that learned judge and notwithstanding my personal inclination to accept and follow that decision, it seems to me to be at variance with that of the House of Lords in *Morris* v. *Davies* (5), where the husband and wife were in fact living apart under a separation deed executed

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(1) 1 Sim. & St. 153, 158, 159.
(2) 12 P. D. 112.
(3) [1924] P. 255.
(4) [1926] P. 24.
(5) 5 Cl. & Fin. 163.

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by them, and also with the decision in *The Aylesford Peerage* (1), where also the husband and wife had executed a separation deed and were at the material dates living apart under its provisions.

In my judgment, I am bound by those decisions to decide the present case on the footing that the fact that the parties were at the material dates living separate and apart under a separation deed does not render the presumption inapplicable. This being so, it is necessary to consider in what circumstances the presumption may be rebutted. A careful consideration of the authorities leads to the conclusion that if the parties have opportunities of access, it is necessary in order to rebut the presumption, to prove that such access did not take place between the husband and wife as is necessary in order for the husband to be the father of the child in question. I use the word " access " in the sense in which it is defined in the fifth answer in the *Banbury Peerage Case* (2) in the following passage : " The non-existence of sexual intercourse is generally expressed by the words ' non-access of the husband to the wife ' ; and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word ' access,' the husband may be said to have access to his wife as being in the same place or the same house ; and yet, under such circumstances, as instead of proving, tend to disprove, that any sexual intercourse took place between them." In their fifth answer in the *Banbury Peerage Case* (2) the judges stated that the presumption of legitimacy could " only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child, and the evidence to

(1) 11 App. Cas. 1.

(2) 1 Sim. & St. 153, 158, 159.

prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse, the husband could by the laws of nature, be the father of such child." The evidence must, as the Lord Chancellor said in *Morris* v. *Davies* (1), "be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the court or jury, to whom that question is submitted." The question cannot be decided upon a mere balance of probabilities. To quote Lord Lyndhurst's words: "That presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." In considering these statements it is, I think, necessary to bear in mind that the fact to be proved is in a sense a negative and consequently in some of its aspects is incapable of positive proof. Mr. Stone on behalf of the defendant Clive Arthur Aubrey urged that in a case where there was evidence of meetings between the husband and wife, and using the word "access" in its wider sense and not in the sense in which, in the *Banbury Peerage Case* (2), the judges stated they were using it in their answers, there was a presumption of sexual intercourse which could only be rebutted by direct evidence that no such intercourse in fact took place; and for this argument he relied on certain statements to be found in the judgments in *Reg.* v. *Inhabitants of Mansfield.* (3) The story unfolded in the report of that case appears at first sight strongly to suggest a finding in the opposite sense to that arrived at by the court, but I think the actual finding is explained by the fact that the only witness called at the trial was the wife, most of whose evidence was not admissible, and the case was therefore treated as being one in which no contrary evidence was available. Mr. Stone's argument is in effect the same as was advanced in favour of the appellant in *Morris* v.

(1) 5 Cl. & Fin. 163, 215, 252, 265. (2) 1 Sim. & St. 153.
(3) (1841) 1 Ad. & El. 444.

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Davies. (1) The Lord Chancellor dealt with it in these words: "I consider the *Banbury Peerage Case* (2) as establishing a principle, not only from the opinions of the judges, but from the points actually decided, distinctly negativing the presumption argued for at the bar,—namely, that where the evidence proves that the husband and wife had opportunities of access, from being shown to have been in the same house or place, no evidence from the conduct of the parties, that is, no circumstantial evidence, can be received to repel the presumption of sexual intercourse, and therefore of the legitimacy of the child,—because,"—and this is the ground on which the argument was rejected—"first, in that case, there was no evidence of any separation or quarrel between Lord and Lady Banbury, and the presumption of their living together as man and wife, and of a sexual intercourse therefore arose, but yet was capable of being repelled by circumstantial evidence." It is plain that in the *Banbury* case (2) the presumption of sexual intercourse arising from the fact that the husband and wife were living together was rebutted by the conduct of the parties and other circumstantial evidence.

What are the material facts in the present case? It is clear from the correspondence exhibited that the husband and wife were not living together at the beginning of 1921. They appear to have parted in June of the preceding year. In October of that year, the wife was suing the husband in the King's Bench Division of the High Court for money lent and the return of certain chattels. Negotiations were in hand for the execution of a deed of separation. On February 3, 1921, the wife's solicitors wrote to those of the husband a letter in which is this statement: "Our client"—that is the wife—"sees no reason for exchanging addresses, as she has no desire to communicate further with your client," that is the husband; while in April of the same year the wife is writing to her solicitor telling him not to mention that "we are out of town as he"—the husband—"might try to find us." There is nothing in the correspondence to suggest that the wife and husband ever met during this period before the deed of separation was executed. Mr. Horton's evidence is that he first met the wife in April, 1921, and that they began to live together as man and wife some four or five weeks after that date, and that from May until September they lived together at week-ends. There is a statement to the effect that the wife told Mr. Horton at some time during the period between May and September, 1921, that she had been to London with regard to the sale of her house at Hornsey and that she had seen her husband with regard to certain furniture he had belonging to her. The wife and Mr. Horton moved in September, 1921, to 16 Denbigh Street, where they lived as man and wife for some months. They left that address and moved to Brixton, where the defendant Dene Horton was born. They returned to 16 Denbigh Street after that event. They continued to live together for some years, and finally separated in 1927. I have already referred to the facts relating to the registration of the birth of the defendant Dene Horton. From early infancy he has been brought up under the care of Mr. Horton's parents. So far as the evidence goes, there is no suggestion that the husband knew of his existence. Certainly he was never asked to provide for him and never acknowledged him as his child. A consideration of the evidence leaves no shadow of doubt in my mind that the husband was not the father of Dene Horton and that there was no sexual intercourse between the husband and wife at the material time when he was conceived. I have no hesitation in holding that Dene Horton is not a legitimate child of Margaret Nora Cuthbert and Archibald Cuthbert.

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(1) 5 Cl. & Fin. 163, 215, 252, 265.

(2) 1 Sim. & St. 153.

It remains to consider the evidence with regard to the defendant Clive Arthur Aubrey. Some time before August, 1928, Mr. Arthur Henry Aubrey, being then nineteen years of age, went to lodge with the wife. At this time the latter was about forty years of age. Very soon after his arrival intimacy took place between him and the wife, and this continued during a period which ended in November, 1928, when there was a quarrel. Mr. Aubrey left the house and returned to his parents. On March 25, 1929, the defendant Clive Arthur

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Aubrey was born. The nurse in attendance on Mrs. Cuthbert telephoned to Mr. Aubrey and told him that Mrs. Cuthbert wanted to see him. He went to London, and was told by Mrs. Cuthbert that it was his duty to register the child as his. He accordingly went with her to the registrar, and the result appears on the birth certificate of the defendant Clive Arthur Aubrey. There is no evidence to suggest that the husband knew of the birth of this child. He certainly has never been acknowledged by the husband as his child. Since Mrs. Cuthbert's death the child has been residing under the care of Mr. Aubrey's parents. If the evidence stopped there, there could I think be no reasonable doubt but that the child was illegitimate. It is said, however, that the weight of this evidence is displaced because Mr. Aubrey has stated that while he was living with Mrs. Cuthbert, her husband used to visit her not only for the purpose of seeing her children, Heather and Ian, but also on other occasions, and that on these occasions he (Aubrey) used to go out; but he does not state at what time he was in the habit of returning or whether he ever found the husband still there. Having regard to his pecuniary interest and the vague nature of the suggestion, I do not think much weight can be attributed to this statement or to the statement that Aubrey was told by Mrs. Cuthbert that she and her husband were considering making a home together again. Obviously if intercourse had taken place between the husband and wife, there was cogent reason for registering the husband as the father of the child. In my judgment, there is no reasonable doubt in this case also; and I hold that the defendant Clive Arthur Aubrey is not the legitimate child of the wife and the husband. I therefore answer the questions raised by the summons in the negative.

Solicitors: *Warren & Warren; Pattinson & Brewer; Piper, Smith & Piper; Doyle, Devonshire & Co.*

A. R. T.

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April 4.

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April 30; *May* 1.

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Company—Management by another Company—Remuneration—Sum equal to half net profits—Agreement to terminate management—Surrender of management share—Agreement to pay compensation to be raised by issue of debenture stock—Transaction not ultra vires.

By an agreement dated September 23, 1925, after a recital that a management share of 1*l.* of the S. T. Co. had been allotted to the S. Co. as manager of the S. T. Co. it was agreed that the S. Co. should be entitled to act as manager during the S. T. Co.'s operation of a certain undertaking and to receive in respect of each financial period of the S. T. Co. 50 per cent. of its net profits. The management share entitled the S. Co. to a majority of the voting power of the shareholders at any meeting and to a share of the surplus assets of the S. T. Co. in a winding-up after payment off of the preference share capital. In 1933 the rights of the management share were varied, and it became known as a reversionary share. The S. T. Co. having become desirous of putting an end to the management of the S. Co., a draft agreement had been prepared terminating the management in consideration of the payment to the S. Co. of 100,000*l.* to be raised by the S. T. Co. by the issue of debenture stock. Incidentally the reversionary share was to be converted into an ordinary share. On the application of a shareholder of the S. T. Co. to test the legality of the proposed agreement:—

Held, by the Court of Appeal (reversing the decision of Eve J.) that it was not ultra vires the S. T. Co. to enter into the proposed agreement. It was no objection to the agreement that it involved the redemption of the annual charge on the S. T. Co.'s net profits out of capital raised for the purpose.

Famatina Development Corporation, Ld. v. *Bury* [1910] A. C. 439, distinguished.

By an agreement dated September 23, 1925, and made between the Singapore Traction Company, Ld. (hereinafter referred to as " the Singapore Company "), and the Shanghai Electric Construction Company, Ld. (hereinafter referred to as " the Shanghai Company "), after reciting that the Singapore Company was incorporated under the Companies Acts with a capital of 400,000*l.* divided into 200,000 preference shares of 1*l.* each, 199,999 ordinary shares of 1*l.* each, and one management share of 1*l.* allotted to the Shanghai Company in consideration of its entering into this agreement, it was agreed that the Shanghai Company should manage the business of the Singapore Company in Singapore so long as it was entitled to operate the undertaking authorized by the Singapore Traction Ordinance, 1925, and should be entitled for acting as manager to receive, in respect of each financial period of the company as therein defined, 50 per cent. of a sum equal to the amount of the net profits of the company for the period, calculated before certain deductions were made. Under the articles no dividend as such was payable in respect of the management share, but it gave the manager a majority of one over all other votes which could on any poll be cast by all other shareholders present in person or by proxy, so that the Shanghai Company had complete control of the voting power. The management share also conferred a right on a return of capital in a winding-up to one half of any surplus assets remaining after making provision for the claims of the preference shareholders. At a later date the management share was renamed the reversionary share, and its voting rights altered so that upon a poll on any special or extraordinary resolution (except a resolution for removing an elected director) the holder should have such a number of votes as should (together with any other votes exercisable by him) exceed by one one-third of the total votes which could be cast by all the other shareholders present in person or by proxy.

This management was profitable to both undertakings until about 1934, when the Singapore Company experienced a reduction in profits owing to motor-omnibus competition with their tramways, and for this reason and others, including the fact of the removal of the head office of the Shanghai Company from London to Shanghai, negotiations were entered into between the two companies for the determination of the agreement of 1925 and the taking up by the Singapore Company of their own management. A draft agreement between the companies had been prepared and approved by each company in general meeting under which, in consideration of the Shanghai Company agreeing to the termination of the management agreement and as compensation to it for its loss of office as manager, the Singapore Company was to pay to the Shanghai Company the sum of 100,000*l.* It was there recited that the termination of the management agreement involved the alteration of the Singapore Company's articles so as to extinguish the special rights attached to the reversionary share, which was to be transferred to the Singapore Company. It was proposed to pay the sum of 100,000*l.* out of a fund to be raised by the issue of 250,000*l.* debentures required for that and other purposes of the Singapore Company.

The plaintiff company, Investment Trust Corporation, Ld., the registered holder of 6580 shares in the Singapore Company, moved for an injunction to restrain the Singapore Company from carrying the intended agreement into effect on the ground that the transaction involved the redemption of a charge on profits by an issue of capital moneys and was ultra vires the Singapore Company. It was not suggested that it was not a fair and honest business transaction, and the action was brought as a friendly proceeding to test its legality.

Harold Christie K.C. and *J. G. Strangman* for the plaintiffs. We do not question the bona fides or the excellence of the motives of the Singapore and Shanghai companies in entering into this arrangement, and if it is legal, we do not suggest that the compensation of 100,000*l.* is exorbitantly large.

But the Singapore Company proposes to purchase this reversionary share for the benefit of its ordinary shareholders, and this, we submit, is a proposal ultra vires the company: *Trevor* v. *Whitworth* (1), per Lord Herschell. The motive of the purchaser makes no difference if the purchase is ultra vires the company. The principles laid down in *Trevor* v. *Whitworth* (1) have been applied in many other cases. A company cannot apply its capital in reducing a charge on its annual income: *Bury* v. *Famatina Development*

(1) (1887) 12 App. Cas. 409, 414.

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Corporation, Ld. (1) In that case it was proposed to extinguish a bonus on income bonds, payable exclusively out of the net profits by an issue of new shares, and the Court of Appeal, reversing the decision of Parker J., held that the proposed arrangement was equivalent to paying dividends out of capital, and provided a means of issuing shares at a discount. The same principles were applied in *In re Walters' Deed of Guarantee.* (2)

Gavin Simonds K.C. and *Gordon Brown* for the Singapore Company. We submit that the proposed agreement is intra vires the company. If it was merely proposing to buy its own shares without obtaining any tangible asset, the case would fall within *Trevor* v. *Whitworth* (3) and other authorities cited.

But these cases are distinguishable. The company finds itself burdened with an agreement which has become onerous and detrimental, and in the future might even become fatal to its existence.

The directors of the company think it worth while to pay the Shanghai Company 100,000*l.* to obtain a release from the management agreement. That release is a very tangible asset to the company. A company cannot buy its own shares, because it would be reducing its capital without authority. But the reversionary share allotted to the Shanghai Company is for the purpose of giving a majority vote to the management, and it carries no right to any dividend. The Shanghai Company stipulated that the management agreement should be supported by giving it a share in the Singapore Company, and the surrender of that share simply means that the management rights will be cancelled. It does not involve any reduction of the company's capital.

The remuneration payable under the management agreement is not a dividend, but is fifty per cent. of a sum equal to the amount of the net profits, before deduction of taxation and the managers' remuneration: a purely artificial figure. In *Trevor* v. *Whitworth* (3) the company proposed to spend

(1) [1909] 1 Ch. 754; [1910] A. C. 439.

(2) [1933] Ch. 321.

(3) 12 App. Cas. 409, 414.

money in a way that could not assist them in carrying on their business, and for which they received no tangible assets: see per Lord Herschell. (1) Here the company value freedom from this burdensome agreement at 100,000*l.* For very good business and political reasons we desire to get rid of the Shanghai Company's management; it does not follow that the actual cost of management will be reduced, but the company will recover its freedom. In *Famatina Development Corporation Ld.* v. *Bury* (2) Lord Macnaghten said that the directors "would be issuing shares without payment either in money or in money's worth." Exactly the opposite is the case here. The directors consider this agreement essential to the interests of the company.

Lionel Cohen K.C. and *Andrewes-Uthwatt*, for the Shanghai Company, adopted the above argument and referred to *In re Walters' Deed of Guarantee.* (3)

Christie K.C. replied.

Eve J. For something like ten years past the business of the Singapore Traction Company, Ld., has been managed by the second-named defendant company, the Shanghai Electric Construction Company, Ld. The relationship between the two companies was regulated by an agreement dated September 23, 1925, subsequently modified by another agreement to which it is not necessary for me to refer at length. The earlier agreement is made between the two companies, and the first few recitals are important. It begins by saying: "Whereas the company"—that is, the Singapore Company—"was incorporated under the Companies Acts with a capital of 400,000*l.* divided into 200,000 preference shares of 1*l.* each, 199,999 ordinary shares of 1*l.* each, and one management share of 1*l.*, and whereas the one management share of the company has been allotted to the managers"—that is, the Shanghai Company—"credited as fully paid up in consideration of the managers entering into this agreement," and then there is a recital that the company proposes to make an issue of 250,000*l.* guaranteed first mortgage debenture stock redeemable as therein mentioned, and that the Shanghai Company had agreed to guarantee the due payment of the principal and interest of that debenture stock, including the premium, if any, payable on redemption, for a commission amounting to 1 per cent. per annum. I do not think that I need refer further to the recitals. The management share had been allotted to the Shanghai Company, and it is necessary to examine what were the results which followed from that. That depends on the constitution of the company, and, in particular, on those articles which dealt with the respective rights of the three classes of shareholders—the holders of the preference shares, the ordinary shares, and the management share.

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(1) 12 App. Cas. 417.

(2) [1910] A. C. 439, 443.

(3) [1933] Ch. 321.

Article 68 of the old articles of association provided: "The initial capital shall be divided into 200,000 preference shares of 1*l.* each, 199,999 ordinary shares of 1*l.* each, and one management share of 1*l.*" I need not refer to the rights of the preference shareholders. They were preferential and their rights were maintained throughout. The ordinary shares conferred on the holders thereof "the right to receive by way of dividend in proportion to the amounts paid up or credited as paid up thereon all profits which it should from time to time be determined to distribute by way of dividend in excess of the amount required to provide for the dividends on the preference shares, and on any return of capital in a winding-up or otherwise to have distributed amongst them in proportion as aforesaid one-half of any surplus assets remaining available for distribution after making due provision for the claims of the holders of the preference shares." Then it says: "The said management share shall not confer on the holder thereof any right to dividends, but it shall confer on such holder the right on a return of capital in a winding-up or otherwise to the remaining half of such surplus assets as aforesaid."

I think that there is one other article to which I ought to refer, and that is article 91, which provides: "On a show of hands every member personally present shall have one vote only, and in the case of a poll every member shall have one vote for every preference or ordinary share held by him. In case a poll is demanded at any general meeting the said management share shall confer on the holder thereof such number of votes as shall together with any other votes exercisable at such meeting by the holder of the said management share exceed by one the total number of votes which could on such poll be cast by all other shareholders present in person or by proxy and entitled to vote at the meeting." So that under the articles the position of the holder of the management share was that the holder took nothing by way of profits, but had the complete control of the voting power and was in a position to prevent any poll being taken or any satisfactory vote being recorded. The holder was always in a majority.

The next matter to which I think that I ought to refer in the agreement of September 23, 1925, is clause 9. That deals with the remuneration which the Shanghai Company is to receive for acting as manager and for other services. It provides that as remuneration for its services under the agreement the manager should be entitled to receive in respect of each financial period of the company 50 per cent. of a sum equal to the amount of the net profits of the company for such financial period calculated before deducting certain other matters to which reference need not be made, including the remuneration payable to the manager, and the profits are to be ascertained in manner hereinafter appearing. I do not think that it is necessary to go into detail. It comes to this: that the manager, as part of its remuneration, is to receive a sum equal to 50 per cent. of the profits distributable as dividends, subject to powers reserved to the company to create a reserve fund and to carry forward undistributed profits.

The arrangement seems to have been a profitable one for both of the undertakings until quite recently, but in recent times there has been a reduction of profits, not due to mismanagement on the part of the Shanghai Company, but to a certain amount of competition which has arisen and has resulted in this, that the concession from the municipality is not now as valuable as it was in the past. The Singapore Company has come to the conclusion that the time has arrived when, in view of existing circumstances and what it is anticipated may happen in the future, its undertaking can be more profitably worked, and better looked after, if a termination is put to the agreement. There is no suggestion that this conclusion is anything but a perfectly honest conclusion, founded on facts which are stated with exactitude, and I have no doubt in perfect good faith, in the affidavit filed on behalf of the Singapore Company. The proposal involves the recovery, or the transfer or retransfer, of the management share to the Singapore Company for the benefit of the Singapore Company, and it involves the payment of a very large sum, but a sum which it is not suggested is excessive, by the Singapore Company to the Shanghai Company. Here, again, I accept the evidence that the figure has been arrived at in the usual way when a purchaser and a vendor come together to negotiate the purchase price. One asks for more, the other offers less, and so it goes on until ultimately a sum is agreed upon.

In this case the parties have agreed that the advantages which flow from the relationship of the Shanghai Company to the Singapore Company can be valued at something like 100,000*l*. One may pause here to examine what advantages the Shanghai Company has. It has a right, so long as the agreement is subsisting—and as matters are I think that it would be right to assume that it may last for the rest of the period for which the original concession was granted—to receive one-half of the distributable profits. Those may amount, and in prosperous years they do amount, to a very considerable sum.

The question is how can this arrangement be made, an arrangement which one approaches from the point of view, so far as one is entitled to do so, of desiring to uphold it rather than to destroy it. It is a business arrangement entered into with propriety and honesty, and involves nothing which strikes one at first sight as either contrary to law or as providing any excessive remuneration, or payment, for the obtaining of that which the Singapore Company desires.

The difficulty is with regard to the 100,000*l*. If the 100,000*l*. came from or represented accumulated profits, it is not denied that the purchase of these rights of the management shareholder could be made out of the profits for the benefit of those to whom the profits belong. Nobody could then say that the transaction was in any way ultra vires the company, but, unfortunately, the Singapore Company is not in a position to provide the money unless it gets it from somebody else, and the suggestion is that the required amount should be raised on the security of debenture stock.

But it is said that this is wholly wrong; that the effect of this is to convert the charge which the Shanghai Company has on profits of the Singapore Company into a secured debt payable by the company, and that this brings about a state of things which shows the case to be in the line with the cases which have followed: *Trevor* v. *Whitworth* (1) and of which perhaps the best illustration for this purpose is the case of *Bury* v. *Famatina Development Corporation, Ld.* (2) In that case there was an attempt to raise capital moneys in order to utilize them for the purpose of paying a contingent income debt, and the Court held that that could not be done by pledging the credit of the company and converting what was a charge on profits into something of a different nature. The more one considers it, the more apposite are those decisions to the facts of this case.

In these circumstances, although, if I may say so, I should have been very glad to have sanctioned the arrangement if I could have seen my way to do so, I feel that I have no alternative but to say that the plaintiff company is entitled to an injunction substantially in the terms in which it has claimed it, and if the parties are content to treat this as the trial of the action, the action can be disposed of.

By agreement of counsel the motion was treated as an interlocutory motion only, so as to expedite an appeal should

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(1) 12 App. Cas. 409. (2) [1909] 1 Ch. 754; [1910] A. C. 439.

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it be decided to appeal. The costs of the motion to be costs in the action.

H. L. L.

The Singapore Company appealed. The appeal was heard on April 30 and May 1, 1935.

Gavin Simonds K.C. and *Gordon Brown* for the appellants.

Harold Christie K.C. and *J. G. Strangman* for the plaintiffs.

Lionel Cohen K.C. and *Andrewes-Uthwatt* for the Shanghai Company.

Lord Hanworth M.R. This appeal, which raises an important and interesting point, is against an order of Eve J. granting an interlocutory injunction restraining the defendants, the Singapore Company, until judgment from entering into an agreement with the defendants, the Shanghai Company, in the terms of a draft agreement, which is exhibited to an affidavit.

That the points may be elucidated, and our judgment made plain, it is necessary to state the facts with some little care. Before 1925 a company known as the Singapore Electric Tramways, Ld., was carrying on a tramway undertaking at Singapore. It was not very successful, and ultimately a receiver and manager had to be appointed, who was the distinguished accountant who is now Lord Plender. At that time an arrangement was proposed and an ordinance granted authorizing the transfer to a new company of the undertaking of the Singapore Electric Tramways, Ld.

The matter was carried out in this way. There was an ordinance passed by the Governor on May 30, 1925, and called the Singapore Traction Ordinance, that gave a concession for the working of trolley-vehicles, omnibuses, and other vehicles within the settlement of Singapore. The concession was made to the Shanghai Company, but the powers were not to be exercised unless within twelve months the Shanghai Company transferred the undertaking to a new company to be called the Singapore Traction Company, Ld. The concession conferred the usual powers contained in a private Act of Parliament granting the powers of operating a tramway. It also contained a proviso in clause 65 intended to secure British control; and that clause declared that " If at any time the company be or become a foreign company or a company under foreign control or if the powers and authorities by this ordinance conferred become vested in any foreigner or foreign company or company under foreign control the said powers and authorities shall forthwith cease and determine and shall be no longer exercisable."

That ordinance was followed by another of the same date, which contains matters of history which I must introduce as part of the facts. It stated that: " Whereas for some time prior to the passing of the Singapore Traction Ordinance, 1925, the Singapore Electric Tramways, Ld., ... a company incorporated in England in the year 1905 under the English Companies Acts, 1862 to 1900, was operating a tramway undertaking in Singapore," and was authorized to construct, equip, and maintain tramways in Singapore along the routes specified in an old ordinance. It also stated that before and since the passing of the Singapore Traction Ordinance, 1925, negotiations had proceeded for the formation of the Singapore Company with a view to its acquisition of the undertaking authorized by the Singapore Traction Ordinance, 1925, and for the undertaking of the old company. The ordinance then authorized the transfer from the old company to the new company of its property and assets under the terms of an agreement the form of which was scheduled to this second ordinance. That agreement was made between Sir William Plender, as the receiver and manager of Singapore Electric Tramways, Ld., and as liquidator representing the company—there called " the old company "—with, among other parties, the Shanghai Company and the Singapore Company, there called " the new company." Provision was made for the transfer to the new company, but it was a term of the agreement that the undertaking of the new company should be managed by the Shanghai Company under a management agreement so long as the new company was entitled to operate the undertaking authorized by the Singapore Traction Ordinance, 1925.

The new company was duly formed to carry out the terms

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of that ordinance, and for that purpose to enter into the above-mentioned agreement. It also entered into a management agreement dated September 23, 1925, under which the Shanghai Company was to have the management of the new company so long as it was entitled to operate the undertaking, and the Shanghai Company received one management share which conferred a voting power, which should always exceed by one the total number of votes which could on any poll be cast by all the other shareholders, and also a right in a winding-up to part of the surplus profits. As remuneration for its services the Shanghai Company was to receive 50 per cent. of a sum equal to the net profits of the company.

This remuneration is provided for by clause 9 of the management agreement, which is in the following terms: "As remuneration for its services under this agreement the manager"—that is, the Shanghai Company—"shall be entitled to receive in respect of each financial period of the company 50 per cent. of a sum equal to the amount of the net profits of the company for such financial period calculated before deducting the remuneration payable to the manager hereunder and before charging any British taxation which shall be imposed upon the company in respect of profits and for the purpose of which taxation the remuneration of the manager hereunder shall be liable to be brought into the manager's assessment of profit but after making proper and usual provision for depreciation and renewals . . . ." It follows that after this agreement was made on September 23, 1925, the position was that the Shanghai Company was the manager of this new company which had been formed to work the new concession. It was to receive very considerable sums in respect of its services; and it had its right confirmed to it by means of the management share and the voting power which it conferred of always having one vote beyond any possible combination of opposing voters.

It seems as if the Shanghai Company had secured a very large share of the profit of the undertaking, but I do not stop to criticize the terms of that agreement. It was entered into by persons who were completely competent to form a proper measure of their own interests. Exactly how far the Shanghai Company had been responsible for the clearing up of the difficulties which surrounded the tramway company previously and, I dare say, of providing capital for the new company, is not a matter for us to inquire into. But at first sight it would seem as if the Singapore Company was paying a very considerable sum for what is called management. The management, of course, would control policy, but actual expenses would be met in the ordinary course as running expenses of the company which the Shanghai Company was to manage. In fact, we are told in the evidence that over the years from 1926 to 1933 the total sum received by the Shanghai Company was 152,000*l.*, or an average of nearly 22,000*l.* a year.

The position of the Shanghai Company was modified in 1933 by a supplemental agreement and the voting power attached to the management share, which was afterwards called a reversionary share, was modified. But the alterations made in 1933 still left the Shanghai Company with an interest in the profits of the Singapore Company to the extent described in clause 9 of the management agreement.

Certain difficulties have arisen. It is not certain that the Shanghai Company will always be controlled in the same way that it had been before. A divergence, I understand, has arisen between the Shanghai Company and the Singapore Company, and for various reasons it has been thought wise to get rid of the management powers of the Shanghai Company. There was also some resentment in Singapore against the management by the Shanghai Company of a concern which operated entirely within the limits of Singapore; and this feeling might it was feared cause powers to be given to a rival corporation or body of persons who could then by competition affect the profits of the Singapore Company.

The various considerations which led to the agreement I am about to refer to are set out in Mr. Hawkins's affidavit. I need not recapitulate all the reasons which are given. At any rate, those reasons led to the proposed agreement being entered into, and its short effect is that the Shanghai Company agrees to the termination of its management and to receive compensation for giving up its rights in the sum of 100,000*l.*

The clause in the agreement which provides that is as follows: "In consideration of the Shanghai Company agreeing to the termination of the management agreement and as compensation to it for its loss of office as manager of the Singapore Company the Singapore Company shall pay to the Shanghai Company the sum of 100,000*l.* such payment to be made within one month after this part of this agreement becomes operative." Incidentally, it is recited in the agreement that "the termination of the management agreement involves as incidental thereto the alteration of the Singapore Company's articles so as to extinguish the special right at present attached thereby to what originally was called the management share, but since the alteration of the articles in 1933 was called the reversionary share."

That is the agreement which is the subject-matter of the present proceedings. The writ was issued asking for a declaration that it was ultra vires the Singapore Company to pay or enter into an agreement to pay to the Shanghai Company the sum of 100,000*l.* by way of compensation, and for a consequential injunction restricting the Shanghai Company's powers.

Eve J. considered the matter very carefully, and he made the following observations: "There is no suggestion that this conclusion is anything but a perfectly honest conclusion, founded on facts which are stated with exactitude, and I have no doubt in perfect good faith, in the affidavit filed on behalf of the Singapore Company." Then he says this: "The question is how can this arrangement be made, an arrangement which one approaches from the point of view, so far as one is entitled to do so, of desiring to uphold it rather than to destroy it? It is a business arrangement entered into with propriety and honesty, and involves nothing which strikes one at first sight as either contrary to law or as providing any excessive remuneration, or payment, for the obtaining of that which the Singapore Company desires." He indicates the same thing when he says later: "I should have been very glad to have sanctioned the arrangement if I could have seen my way to do so," but he granted an injunction restraining the conclusion of the agreement by reason, or practically by reason, of the decision in *Famatina Development Corporation, Ld.* v. *Bury.* (1)

I pause to make a short survey of the position at the time when the agreement in question was proposed. The Singapore Company had come to the conclusion that it was no longer to its interest to be managed by the Shanghai Company, and there are valid reasons set out, which nobody controverts, for its coming to that conclusion. There are possibilities, whether proximate or remote does not matter, that it might endanger the success of the company if its present concession was cut into by some rival enterprise, a possibility which could not be ignored. It is sufficient to say that on neither side is it suggested that this proposal is anything other than a business arrangement suggested by perfectly honest considerations of the present and future possibilities and prosperity of the Singapore Company.

It is, therefore, as Eve J. says, an agreement to which one would wish to give validity. I think it is also important to bear in mind that this form of agreement for getting rid of a director, a management, or an agency is one which has come before the Court in a different form recently more than once, and it has been found that such a change of management or agency may enure to the benefit of a company. I give as a couple of illustrations of this the cases which came before this Court on the question whether a deduction ought to be made in respect of the expense so incurred by a company in ascertaining their assessment to income tax. In *Mitchell* v. *B. W. Noble, Ld.* (2), it was held that a sum of 19,200*l.*, paid to a director whose services the company no longer wished to retain, was money wholly and exclusively laid out and expended for the purposes of the trade and could therefore be deducted; and in *Anglo-Persian Oil Co.* v. *Dale* (3) the same question arose as to the sum of 300,000*l.* paid to

(1) [1910] A. C. 439.
(2) [1927] 1 K. B. 719.
(3) [1932] 1 K. B. 124.

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terminate a particular agency. There again it was held that that was a sum which could be deducted as money wholly expended in the carrying out of the trade. It was a sum which was expended to bring back into the hands of the company a necessary ingredient of its existing business.

I have only given those illustrations for the purpose of indicating that as a matter of business there seems to be no objection to the making of an agreement of this kind. What may have seemed some years before to be beneficial to a company, either in the matter of an agency or in the matter of a system of management, then constituted, may after the passage of years prove to be undesirable. But whether the agreement of which we are considering the termination is one of management or of agency, it appears that it is a matter on which directors may justly and legitimately exercise their discretion.

What, then, is the objection which is taken to the carrying out of this agreement? It is that it is proposed to find the 100,000*l.* by means of the issue of debentures; in other words, that the company will borrow the money necessary to provide the sum of 100,000*l.* made payable within one month of the conclusion of the agreement. It is said that that operation is contrary to the principle, and indeed the decision, in the *Famatina Corporation* case. (1)

It is necessary, therefore, to consider very carefully whether or not the *Famatina Corporation* case (1) governs the present case and prevents the carrying out of what may be called a legitimate piece of business in connection with the carrying on of the Singapore Company—and a piece of the business which would be most advantageous in the opinion of the directors who are concerned to carry it out. To my mind, the *Famatina Corporation* case (1) does not govern the present case. It is to be remembered in reference to that decision that the operation which was proposed was one of a somewhat extraordinary nature. It was not an ordinary transaction involved in carrying on the business of the Famatina Company. The company had been in serious difficulties, and in order to get

(1) [1910] A. C. 439.

money they had borrowed it by the issue of what were called income bonds, and the straits of the company are indicated by the fact that a lender of a principal sum of 10*l.* only was to receive by way of bonus for his somewhat slender loan a sum of 25*l.* That bonus was to be paid and the sum lent to be repaid exclusively out of the net profits from time to time of the company and would, so far as possible, be paid in equal instalments of 5*l.* each, spread over a period of seven years. Therefore every lender would be entitled to a total sum of 35*l.*, made up of the 10*l.* advance and 25*l.* bonus, and if he was paid over seven years 5*l.* a year he would be getting back his money with the interest as capitalized in the bonus. Condition 13, endorsed on each bond, enabled the company to pay off the bonds with the bonuses on the expiration of six months' notice. What was proposed was to satisfy the bonus by the issue of twenty 1*l.* shares, but it was held by the Court of Appeal and the House of Lords that condition 13 did no more than to give the company the right to advance the date of payment by substituting for payment by instalments a single payment made six months after notice had been given. I think it is plain, from an examination of the case before Parker J. and in the Court of Appeal and the House of Lords, that the operation under consideration was, both in its origin and in its proposed conclusion, exceptional. It was not a part of the ordinary carrying on of the business of the company. There was a special effort directed to raising money when the fortunes of the company urgently needed it, followed by a proposal to make repayment in a very special manner, and neither of these operations was connected really with the ordinary operations of the company's business.

Here we are dealing with a matter arising in the ordinary management of the company directed to deciding whether the management should be in the hands of the Shanghai Company or of the board of the Singapore Company.

Lord Macnaghten came to the conclusion in the *Famatina Corporation* case (1) that the proposal for repayment made in that case could not be carried out because the issue of shares to the income bondholders in respect of their bonuses would have amounted to issuing shares without payment in money or in money's worth. He examined what was the real charge in favour of the income bondholders, and said (1) that the charge which they retained when they lent the money was "a charge on net profits only; that is, it is a charge on money which the company earns, but which, by the declaration of a general meeting on the recommendation of the directors, is, or would be but for the charge upon it, the property of the shareholders as individuals, and not the property of the company. The company as a corporation would be receiving nothing whatever in return for the extinction of the charge." It is important to consider what that decision involves. The income bondholder, who has not got the right to receive a return from the capital of the company, but has a charge on income and income only, has a mere right to dip into the pool of money which otherwise belongs to and can and will be divided among shareholders as individuals, money which is not the property of the company. The scheme suggested was that the income bondholder was to give up his bonus payable out of income and receive from the company new shares, and the company itself was therefore to get nothing in return for those new shares. The *Famatina Corporation* case (2) seems to me, when the facts are examined, to be merely an application of the rule that a company should not issue shares at a discount, and should not issue shares unless it gets either money or money's worth for them. Lord Macnaghten obviously held that the operation proposed did not give to the company anything in the nature of money's worth.

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(1) [1910] A. C. 439.

I turn to consider the facts of the present case. By the proposed payment the Singapore Company will be getting back into its own hands control of its business. It will be enabled to carry on its business without the prospect of an anticipated danger. It will escape the friction that might arise between two separate boards, one sitting in London

(1) [1910] A. C. 443. (2) Ibid. 439.

and the other at Shanghai, and it is dealing with what might be called an ordinary piece of business of the company, such as I have illustrated in the cases to which I have already referred.

Can it be said that the *Famatina Corporation* case (1) lays down some principle which would be trespassed upon by the proposed agreement? To my mind, in the *Famatina Corporation* case (1) the operation was not in the ordinary course of business, but in the present case it is. The present proposal does not prevent the company getting what is money's worth, and whether the company carries out the arrangement to pay 100,000*l.* by raising money on debentures, or by dipping into some of its resources, as seems possible on the figures before the Court, is a matter for the company to consider. But in every particular the facts of the present case seem to diverge so largely from those of the *Famatina Corporation* case (1) as to prevent that case from applying.

For those reasons it appears to me that the appeal must be allowed and the injunction discharged.

ROMER L.J. I have come to the same conclusion. The evidence and documents have been fully referred to by the Master of the Rolls, and it is unnecessary that I should refer to them further. The material fact which emerges from the documents and from the evidence is that it is essential in the interests of the appellant company to get rid of the management agreement, and to pay a sum of 100,000*l.* for this purpose, not because the manager is receiving too large a salary, nor because in the event of a winding-up the manager as holder of the reversionary share has certain rights in the surplus assets, but purely and solely for the reasons which are set out in the paragraph of Mr. Hawkins's affidavit that has been read by the Master of the Rolls.

If the company had been an individual—that is to say, if we were dealing with an individual who was carrying on the business now being carried on by the company—it cannot be doubted that it would be a wise and business like thing for the

(1) [1910] A. C. 439.

individual to pay the sum of 100,000*l.* for the purpose of getting rid of the manager. That being so, I confess I find it difficult to understand why it should be illegal to make such a payment because the business is being carried on by a limited company and not by an individual.

The limitations on the power of a company in dealing with its capital were stated by Lord Watson in his speech in *Trevor* v. *Whitworth* (1), which has been so often referred to: "Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business."

I should have thought myself that in the circumstances which I have mentioned it would be legitimate for a company such as this, in the course of its business, to make this payment. But it is said, and this contention found favour with Eve J., that we are compelled to hold that this proposed payment of 100,000*l.* is ultra vires the company by reason of the decision of the House of Lords in *Famatina Development Corporation, Ld.* v. *Bury.* (2)

I think it desirable to see both what the *Famatina Corporation* case (2) did not decide and what it did in fact decide. It certainly did not decide that a company can never spend its capital in any way which would necessarily result in an increase of the company's revenue available for dividend. No member of the Court of Appeal and no member of the House of Lords laid down any such proposition. Nor of course could they have intended to lay down such a proposition.

It is perfectly plain that if a company—to take an illustration which I ventured to give in the course of the argument—has a leasehold office for which it is paying a rent, and thinks it desirable in the interest of its business as a whole to acquire the freehold of the premises, the expenditure of its capital for the purpose is legitimate, although one incident, one result, of such payment is that revenue will no longer be debited each year for the annual rent of the offices—rent which might be, and probably would be, larger than the interest previously earned by the capital expended in acquiring the freehold reversion. Again, it cannot be doubted that if a company has a manager whom it thinks it desirable to get rid of, it may pay him a lump sum out of its capital in satisfaction of all his claims under his management agreement, and in consideration of his putting an end to that agreement, although the result, or one of the results, of so doing will be that revenue will benefit in the future to the extent of the manager's salary. The result must surely be the same even though the manager's salary is a salary which depends, and is contingent, on profits being earned by the company.

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(1) 12 App. Cas. 409, 423.

(2) [1910] A. C. 439.

The *Famatina Corporation* case (1) certainly did not decide that in such a case the payment would be illegal. The truth of the matter is that the advantage to the company as a whole in the one case is just as great as it is in the other. If it be worth, say, 10,000*l.* for a company to get rid of a manager whose salary is not contingent on the profits, it would be also worth 10,000*l.* for it to get rid of a manager whose salary is contingent on the profits. In both cases the company would get the advantage of 10,000*l.*, and to get that advantage it is entitled to spend 10,000*l.* of its capital.

What the *Famatina Corporation* case (1) did decide was that the company was getting no advantage whatsoever by the proposed allotment of fully paid shares. The facts of the case have already been referred to by the Master of the Rolls, and it would appear from that statement that what the company was doing was merely to anticipate revenue. The bonds which had been issued were payable out of profits, and out of profits only, and the company was proposing to utilize capital, by the issue of fully paid shares, for the purpose of getting rid of the right of the bond holders to receive in the future part of the profits earned by the company. To the company it did not matter one penny—or so the House of Lords and the Court of Appeal thought—whether the bond holder was paid out at once or whether he was paid by instalments out of future revenue. So that by paying the bondholder at once no advantage was coming to the company, but the only persons, in the view of those Courts, who would get any advantage out of the proposed payment were the shareholders for whose benefit revenue would be set free and made available for dividend.

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(1) [1910] A. C. 439.

That being so, it seems that the *Famatina Corporation* case (1) will not prevent us from upholding the proposed scheme in the present case. The company here as a whole is getting an advantage which the directors have bona fide estimated to be worth 100,000*l.*, and it is therefore, in my opinion, entitled to provide that 100,000*l.* out of its capital resources, even though, as a necessary result of getting rid of the management agreement, revenue will benefit to the extent of the salary paid to the manager, which was a salary equivalent to 50 per cent. of the revenue in each year, and even though the rights attached to the management or reversionary share held by the manager will no longer be attached to that share, which is going to be turned into an ordinary share, with all the incidents pertaining to such a share. It is true that there is nothing to be found either in the management agreement or in the articles of association providing that in the event of the manager ceasing to be manager the right attached to that share should be modified. But throughout the parties appear to have thought that the termination of the management agreement would necessarily involve the change in the rights conferred by the management share, though no part, as I have already pointed out, of the consideration being paid to the Shanghai Company is in truth being paid for the purposes of getting rid of the particular right to the surplus assets attached to that share.

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(1) [1910] A. C. 439.

For those reasons, with all respect to Eve J., who felt himself compelled by the *Famatina Corporation* case (1) to decide the other way, I think that the appellant company is entitled to succeed, and that the injunction must be dissolved.

Maugham L.J. I have come to the same conclusion. The facts have been stated by the Master of the Rolls, and I do not think it necessary for me to add much in relation to those facts. I should like, however, to point out that the present arrangement involves, among other things, a new issue of debenture stock carrying interest at a rate of 5 per cent. instead of 6 per cent. per annum, the procuring of a further ordinance from the Straits Settlement Government, and also the alteration of the company's articles, as well as the transaction of terminating the management agreement which the Master of the Rolls has already mentioned.

The proposed agreement which it is suggested would be ultra vires the company states in para. 8 that " In consideration of the Shanghai Company agreeing to the termination of the management agreement and as compensation to it for its loss of office as manager of the Singapore Company the Singapore Company shall pay to the Shanghai Company the sum of 100,000*l.*, such payment to be made within one month after this part of this agreement becomes operative "—that is, after certain resolutions of the Singapore Company have been duly passed, and the ordinance to which I have referred has become law, and the shareholders have approved of the agreement at a meeting to be held for the purpose.

As has been pointed out, the proposed agreement involves the alteration of the articles of association so as to extinguish the special rights at present attached to what is now called the reversionary share of the Shanghai Company. That, I think, as pointed out by my brother Romer, is no more than something ancillary or incidental to the main substance of the agreement as between the Singapore Company and the Shanghai Company, which provides for the termination of the management agreement so that the Singapore Company becomes at liberty to carry on its own concern in such way as it may think proper.

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(1) [1910] A. C. 439.

That termination has various advantages, of which the two most important may be mentioned. They are not apparent on the face of the transaction, but they are, first, that the proposed agreement obviates any risks of the forfeiture of the Singapore Company's concession in the event of the Shanghai Company becoming foreign-controlled; and, secondly, that it removes a cause of growing local resentment which might well give rise to friction with the Municipal Commissioners, who I may mention incidentally, are largely natives on whose good will and co-operation the fortune and future prosperity of the Singapore Company are in a great measure dependent.

The problems raised in this appeal are closely connected with the question of the payment of compensation for the loss of the office of manager, to which the Shanghai Company is willing to agree for a consideration. The Singapore Company pays nothing, in terms at any rate, and I think in substance, for the surrender of the rights attached to the reversionary share which the Shanghai Company owns. I think the terms of the agreement, and in particular paragraph 8 of the proposed agreement which I have read, demonstrate that fact. It follows that the company is not here proposing to traffic in its own shares, or with the single reversionary share, in any true sense.

The questions which remain are not without difficulty, but, like my brethren, I have come to a clear conclusion on them. The first question which I think may be formulated is shown by taking a case not exactly like this, but simplified for the purpose of consideration. Suppose A has a contractual right to be paid the sum of, say, 10,000*l.* a year out of, and only out of, the future profits of a company, if any. Is it a transaction ultra vires the company for the company to agree to pay to A the sum of 50,000*l.* in consideration of the release of this right? It is said that one or two passages in *Famatina Development Corporation, Ld.* v. *Bury* (1)—and my

(1) [1910] A. C. 439.

brethren have referred to them—may be thought to have lent some support to the proposition that such a release, being the release of a liability to pay a sum only out of future profits, does not create a new asset, and that there will be no new asset to show in the balance sheet as the result of such a transaction. In a sense that is true; but it is also undeniable that the result of the bargain would be to increase the value of the undertaking as a whole, and this for the benefit of the company as a corporation.

Many illustrations can be given of that, and the simplest which occurs to me is that of a company which has acquired a valuable property by purchase, the consideration payable to the vendor being an annuity for his life. It is obvious that if the life annuity were extinguished by a capital payment there would not be any fresh asset which could be entered in the balance sheet. But the value of the property of the company would be increased by reason of the fact that there was no longer the necessity to pay as a charge on the property an annuity for the rest of the life of the vendor. It is, however, contended that the *Famatina Corporation* case (1) shows that such a transaction would be improper, and, as I understand it, ultra vires the company, because it is said that that case decides that the extinguishment of a charge on future profits is a transaction by which the company, as a corporation, receives nothing.

I do not think the *Famatina* case (1) decides anything of the kind. It has to be remembered in considering it that a very curious set of facts was there being dealt with. The company, as has already been said, borrowed 50,000*l.* by the issue of 5000 bonds of 10*l.* each, but the terms were that the principal money of 10*l.* was to be repaid, together with the sum of 25*l.* by way of bonus, but only so far as there were net profits available for the purpose. The registered holder was entitled to convert any ten bonds of the series into a first mortgage debenture of the company for 100*l.*, without prejudice to his right to the bonus. Practically the whole of the bondholders exercised that right, and the result was that there were 50,000*l.* first mortgage debentures outstanding, and rights to bonuses amounting to 125,000*l.* charged on income only. The proposal was to extinguish all the bonus rights, amounting to 125,000*l.*, by the issue of 100,000 fully paid shares; and that, it was suggested, was ultra vires, and it was so held by the Court of Appeal, and by the House of Lords in a judgment of Lord Macnaghten, which the other Lords accepted.

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(1) [1910] A. C. 439.

I think it impossible to consider the decision in that case without observing that their Lordships were faced with a somewhat alarming possibility. They were unwilling to give currency to the view that money could be borrowed by a limited company on terms that a huge bonus should be payable out of future profits, and that the bonuses could then be released or extinguished in consideration of fully paid up shares. If that could properly be done, the device afforded a method of issuing shares at a discount by a very simple process. It has also to be remembered that the right to a bonus was not held by persons who had any obligation towards the company at all. The bonus had been given to them when the original bonds were subscribed for, and accordingly, if the bonuses were extinguished by the issue of so many fully paid shares, the company, as a corporation, would not be getting anything directly from the holders of the bonds, though no doubt the future profits of the company would be relieved from an obligation, and the shareholders of the company, including the people who got shares in return for the extinguishment of the bonds, would therefore get larger dividends than would otherwise be the case.

The decision of the House of Lords was, I think, that expressed by Lord Macnaghten when he says (1): "The company as a corporation would be receiving nothing whatever in return for the extinction of the charge. Nor would the position of the company's creditors be improved in any respect." And if you add to that his statement that the directors "would be issuing shares without payment either in money or money's worth," I think you have an explanation of the view of the House of Lords in deciding that case in the way they did. The words to be emphasized in that last sentence are " without payment either in money or money's worth," because I do not think that Lord Macnaghten pledged himself to the view that there was no consideration whatever for the issue of the shares. He is saying that there would be no payment for the shares, and I have no doubt that he held the view which Farwell L.J. had expressed in the Court below (1)—after citing the passage of Lord Watson's speech in *Trevor* v. *Whitworth* (2)—that it was not a usual and legitimate way of carrying on the business to dispose of contingent profits in futuro in the manner there proposed.

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(1) [1910] A. C. 443.

However that may be, let me now somewhat alter the terms of the question which I suggested, and present it in these terms. Supposing A is appointed manager of a company for life, at a salary of, say, 10,000*l.* a year, payable out of, and only out of, the future profits of the company, if any. Is it ultra vires the company if the company should pay to A the sum of 50,000*l*, say, in consideration of the termination of his management and of all his rights as manager being extinguished? In my opinion, the *Famatina Corporation* case (3) has nothing directly to do with such a problem. If that question be put, it cannot be affected by answering that the company would be receiving nothing whatever in consideration for the extinction of the charge. It would be receiving something. It would be receiving a release of the right of A to continue to manage the company. In other words, it would receive freedom from the obligations under the management agreement.

As I have already said, the sum of 100,000*l.* is to be paid on the terms of para. 8 of the proposed agreement. It is, in my opinion, beyond dispute that the company as a corporation is getting a true consideration in return for the 100,000*l.* On what ground can we then be required to say that such a transaction is ultra vires? As I have already said, it is not a trafficking in the company's shares. It is obviously

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(1) [1909] 1 Ch. 754, 762.
(2) 12 App. Cas. 409.
(3) [1910] A. C. 439.

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not an issue of shares at a discount, because no shares are being issued in connection with the transaction. It is admitted that the transaction is not an unfair one, and on the evidence it is clear that it is in the interests of the company.

In my opinion, then, there is nothing in the *Famatina Corporation* case (1) which compels us to hold that the transaction is one which cannot be entered into by an ordinary trading company in its own interests. In saying that I accept the statement in para. 14 of the affidavit of Mr. Hawkins, that the object of the proposed payment is not solely to discharge a charge on the future profits of the company and on the assets distributable among the members in a winding-up, but to procure the termination of the existing management of the Singapore Company by the Shanghai Company, and to give the Singapore Company unfettered control and management of its own undertaking—and that in the interests of the Singapore Company itself as distinguished from its shareholders.

On those grounds I agree with the judgments already delivered, and the judgment of Eve J., who was endeavouring loyally to follow the decision of the House of Lords in the *Famatina Corporation* case (1), must as a result be reversed.

It was agreed that the motion should be treated as the trial of the action, and the appeal as an appeal therefrom.

Appeal allowed.

Solicitors: *Slaughter & May*; *Allen & Overy*; *Linklaters & Paines.*

H. C. G.

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(1) [1910] A. C. 439.

In re L. H. B. (1)

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July 16.

Lunacy—Infant—Guardian of infant a lunatic—Receiver authorized to exercise powers of guardian—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 128.

The patient, a lunatic, of whose estate a receiver had been appointed under s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, was the sole guardian of her infant son:—

Held, that under s. 128 of the Lunacy Act, 1890, the Court had jurisdiction to authorize the receiver to exercise the powers of custody, control, maintenance and education of the infant vested in the patient as guardian.

FORMAL application referred under r. 10 of the Management of Patients Estates Rules, 1934.

The patient was a lunatic of whose estate the Official Solicitor had been appointed receiver by order dated November 4, 1931, made under s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890. At the date of the order the patient was residing in a mental hospital. The patient was discharged from the mental hospital on November 18, 1932, and resided outside a mental hospital until the end of April, 1935, but the receivership order was not discharged. On April 23, 1935 (while the present application was pending), she was again admitted to hospital and was certified on April 26, 1935. At the time of the hearing before the Court of Appeal she was resident in a mental hospital.

The patient was a widow, her husband having died in the year 1929. She had an infant son who was born on July 18, 1919, and was receiving his education at a public school. At the time of the hearing the patient's property was insufficient for the maintenance of the infant, who was being maintained and educated out of funds provided from outside sources. The only known relations of the infant, apart from the patient, were a sister of the patient residing abroad and a brother of the patient's late husband residing in Scotland.

The patient was the sole guardian of the infant, no testamentary guardian having been appointed by the patient's husband and no guardian having been appointed by the Court.

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(1) Reported by permission of Lord Hanworth M.R.

The application was made by the Official Solicitor as receiver of the patient for authority to exercise the power of custody, control, maintenance and education vested in the patient as guardian of her infant son. The application was heard by Romer L.J. on April 15, 1935, and was adjourned by him into Court. The adjourned application was now heard in camera.

J. W. Brunyate for the Official Solicitor. The order is necessary in order that arrangements may be made for the future holidays of the infant and for launching him in the world. The mother is the sole guardian of the infant by virtue of s. 4 of the Guardianship of Infants Act, 1925, and there is jurisdiction under s. 128 of the Lunacy Act, 1890 (as extended to the case of a receiver by s. 1 of the Lunacy Act, 1908), to authorize the receiver to exercise the powers vested in her as guardian, although no previous case can be found in which the jurisdiction given by that section has been exercised as regards powers vested in the patient as guardian.

LORD HANWORTH M.R. We have considered the facts and the sections of the Acts quoted and are of opinion that there is jurisdiction to make the order asked. The order will authorize the receiver in the name and on behalf of the patient to exercise in such manner as he in his discretion thinks advisable such powers vested in the patient in her character of guardian as relate to the custody, control, maintenance and education of her infant son. The costs may be allowed out of the estate of the patient.

ROMER and MAUGHAM L.JJ. concurred.

Solicitor for applicant : *The Official Solicitor.*

W. I. C.

In re WILKS.

KEEFER *v.* WILKS.

FARWELL
J.

1935
April 11.

[1935. K. 972.]

Administrator—Deceased, domiciled abroad, leaving widow and three infant children—Death intestate as to his English estate—Letters of Administration granted to English administrators—Shares in English private company included in English estate—Law of Domicil—Sale of portion of shares to which infants entitled could not be postponed by trustees in country of Domicil—Power of English administrators to postpone sale—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33, *sub-ss.* 1, 2, 3, 4 ; *s.* 42, *sub-s.* 1.

E. L. W., domiciled in Ontario, Canada, died possessed of estates in Canada, the United States of America, France and England. He left wills disposing of his estates in Canada, the United States and France, but no will could be found disposing of his estate in England. Letters of administration were granted to his widow and the plaintiff. He left him surviving his wife and three infant children. Included in his English estate were a large block of shares in an English private company. According to the law of Ontario the sale of the portion of these shares to which the infants were entitled could not be postponed by administrators appointed in Ontario. The English administrators were anxious to postpone the sale of the shares, and the plaintiff took out this summons asking whether they were entitled, by virtue of s. 33 of the Administration of Estates Act, 1925, to postpone the sale :—

Held, that the English administrators were entitled to exercise the power to postpone given to them by s. 33, until they could get a good discharge for the money in their hands from the persons beneficially entitled to it.

ADJOURNED SUMMONS.

The deceased, Eugene Langdon Wilks, died in France on July 9, 1934, leaving him surviving his widow, the defendant Marguerite Roberte Wilks, and three children, the infant defendants. At the time of his death the deceased was entitled to considerable property in England, France, Canada and the United States of America. He made three wills disposing of his properties in France, Canada and the United States, under which the three infant defendants received considerable benefits. No will dealing with his English assets could be found after his death, and letters of administration were granted to the plaintiff and the defendant M. R. Wilks. The deceased was domiciled in the Province of Ontario, Canada, and according to the law of Ontario the personal property of a person dying intestate is distributed as to one-third to his widow and the residue in equal proportions among his children.

At the time of his death the deceased held 10,925 shares in a private company in England, of which the infant defendants would be entitled in equal shares to 7282. The administrators considered that it would be for the benefit of the infant defendants that they should postpone the sale of the 7282 shares for such a period as they should think proper or for such period as the Court should direct, but they were advised that under the law of Ontario the shares would not be regarded as a trust investment and that an administrator appointed by the Courts of Ontario would be obliged to realize them and pay the money into Court. If the administrators could not retain the shares for the benefit of the infant defendants, the defendant M. R. Wilks was desirous of purchasing them at par.

Under those circumstances the plaintiff took out this summons asking for the determination of the question whether the administrators were entitled by virtue of s. 33 of the Administration of Estates Act, 1925 (1), or otherwise to postpone the sale and conversion for such period as they might think proper of the 7282 shares.

Greenland for the plaintiff. The question is whether administrators acting under an English grant of administration to the assets in England of a deceased person domiciled abroad

(1) Administration of Estates Act, 1925, s. 33, sub-s. 1: "On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—

(*a*) as to the real estate upon trust to sell the same; and

(*b*) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money,

with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession. . . ."

have the power to postpone the realization of English assets given by s. 33 of the Administration of Estates Act, 1925, notwithstanding that such power does not exist by the law of the deceased's domicil. It is clear that administration is governed by the law of the country where the assets are situate and that succession is governed by the law of the deceased's domicil. It has never been decided at what stage administration ceases and the law of succession begins to operate. It might be said that when debts and duties have been paid and a net residue ascertained the administration is at an end and the law of the domicil comes into operation, but the administrators cannot get a receipt for their shares from the infants, and the true view is that in respect of the infants' shares the administration continues during their minorities. *In re Lorillard. Griffiths* v. *Catforth* (1) dealt with the rights of creditors of a deceased domiciled in New York and leaving assets in America and England, and it was held that the English administrators were not bound to transfer the surplus of the English assets to New York.

R. S. B. Best for the widow.

Geoffrey Cross for the infants. In Dicey's Conflict of Laws, 4th ed., p. 747, it is stated that it is prima facie the duty of an ancillary administrator, in a case where the estate is not being administered by the Court, to remit the net residue to the principal administrator. If that is so, it is in conflict with the suggestion that he can retain the net residue in his own hands and continue to keep it subject to the law of the place of administration. The heading of Part III. of the Administration of Estates Act, 1925, suggests that everything contained in that part of the Act is a matter of administration, and s. 42 is apparently applicable to the case of an infant who benefits under the intestacy of a person domiciled abroad.

FARWELL J. This summons raises a curious question which seems at present to be free from authority as to the powers of administrators in this country over property in England of persons who died domiciled abroad.

(1) [1922] 2 Ch. 638.

In this case the deceased was possessed of property in various parts of the world and was admittedly domiciled in Ontario, Canada. He left wills dealing with his property abroad, but he omitted to make a will dealing with his English estate, and, accordingly, letters of administration have been granted to the plaintiff and the first defendant in this country. Their duty is to administer the estate according to the law of this country; but in distributing the estate among the beneficiaries the rights of the parties must be governed by the law of the domicil. In the present case the testator's property in this country consisted, amongst other things, of a considerable holding of shares in a private company. The shares are by no means readily saleable and the legal personal representatives are anxious, if they can properly do so, to postpone the sale of the shares for the present. The persons entitled to the testator's property in this country, according to the law of Ontario, are the widow, who is entitled to one-third, and the children, all of whom are infants. According to the law of the domicil it would not be possible for the administrators in that country to retain these shares on behalf of the infants: they would be bound, according to that law, to sell them at once. If, therefore, having once paid all the debts and other administration expenses the administrators in this country have ceased to have any administrative duties beyond distributing the property among the persons entitled, according to the law of Ontario, it must follow that the rights of those parties must be regulated by the law of the domicil, in which case these shares must be sold. The question, therefore, is at what point the administrators cease to administer the estate in this country and become trustees for the purpose of distributing the estate amongst the persons interested. So long as they are performing the duties of administrators their powers and rights are to be found in the Administration of Estates Act, 1925. If, on the other hand, their only duty is to distribute the estate amongst the persons entitled, according to the law of the domicil, then the powers which are given to them as administrators under the Act can no longer avail.

Part III. of the Administration of Estates Act, 1925, consisting of ss. 32 to 44, is headed " Administration of Assets," and the Fourth Part of the Act is headed " Distribution of Residuary Estate." So that it would look as though the intention of the Legislature was to include in Part III. all those duties which fall to an administrator and in Part IV. to deal with the rights of the parties as to distribution of the assets after the administration has been completed. In Part III., which is the part which deals with the administration of assets, s. 33, sub-s. 1, provides that : [His Lordship read s. 33, sub-s. 1, as set out above, and continued :] Sub-s. 2 provides that : " Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout. . . . . "

Then sub-s. 3 provides that : " During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature."

Then sub-s. 4 provides : " The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as ' the residuary estate of the intestate.' "

The other sections in that part of the Act deal with other matters in connection with the administration of the estate. Sect. 42, sub-s. 1, provides : " Where an infant is absolutely

FARWELL J.

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entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called ' the deceased ') to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised . . . ."

It is noticeable that that section appears to deal with a case of an infant becoming absolutely entitled on an intestacy of a person dying after the Act of 1925. If that section deals only with persons domiciled in this country, it seems to be a curious provision, because under the Act it is no longer possible for an infant to become absolutely entitled on the intestacy of a person domiciled in this country, since the Act itself makes an infant's interest contingent upon his attaining twenty-one or marrying; therefore it looks as though this section is contemplating an intestacy in the case of a person dying domiciled abroad. Whether that be so or not, and I do not propose to found my judgment on that proposition, it appears to me that this is a matter of administration and that the administrators are entitled to exercise the power of postponement which is given them by the Act. They have in their hands money which, no doubt, is the property of the infants, but in respect of which they can get no receipt from the infants because they are still infants. I think that it would be possible for them under s. 42 to appoint a trustee for the infants, and that they could do as administrators. Equally, in my judgment, it is open to them as administrators to exercise the powers to postpone the sale which they are given by s. 33, and until they can distribute the estate by handing over the proceeds or the property to persons who can give them a good receipt for it they are trustees, but trustees holding the property in their character as administrators and having, therefore, the powers which are given to administrators under s. 33 of the Administration of Estates Act, 1925. The power to postpone given by the Act is a power given to administrators and, in my judgment, it is exercisable over the assets which are in this country until the administrators can get a good discharge for the money in their hands from the persons who are beneficially entitled to it. I propose to make a declaration to that effect.

Solicitors for all parties: *Freshfields, Leese & Munns.*

P. J. B.

In re SHENTON.

CLAUSON and FARWELL JJ.
1935
May 27.

Deed of Arrangement—No trust for payment of preferential Debts—Creditor who would be preferential creditor if Debtor a Bankrupt—Promise by Trustee of Deed to grant preferential treatment—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 17—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 15 (*f*)—*Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84)—*Law of Property* (*Amendment*) *Act,* 1926 (16 & 17 *Geo.* 5, *c.* 11), *s.* 3.

On April 21, 1933, the debtor executed a deed of arrangement in favour of a trustee and his creditors. The deed did not contain a trust for the payment by way of preference of those persons who would be preferential creditors if the debtor were in bankruptcy. At the date of the execution of the deed an employee of the debtor was receiving compensation at the rate of 1*l.* 3*s.* 10*d.* per week under an award made pursuant to the Workmen's Compensation Act, 1925. On May 22, 1933, the trustee of the deed wrote, through his solicitors, to the employee's solicitors that he would treat the employee's claim to compensation as a preferential claim. Later he was advised that he was not entitled to grant any preferential treatment. He then brought the matter before the county court of Staffordshire. The county court judge ordered that the trustee should admit the employee as a creditor under the deed and treat him as a preferential creditor pursuant to s. 17 of the Deeds of Arrangement Act, 1914, as if the estate of the debtor were being administered in bankruptcy.

The trustee appealed:—

Held, that the order was not in correct form, because the employee could not be treated as a preferential creditor by virtue of s. 17 of the Deeds of Arrangement Act, 1914, but:

Held, further, that the trustee was entitled, by virtue of s. 15 (*f*) of the Trustee Act, 1925, to grant the employee preferential treatment, and that he was bound by the letter of May 22, 1933, to do so.

APPEAL from Staffordshire County Court.

On April 21, 1933, the debtor executed a deed of arrangement in favour of a trustee and his creditors. The deed was of the usual character, but it did not contain a trust for the payment by way of preference of those persons who would be preferential creditors if the debtor were in bankruptcy.

Under an award made in January, 1931, Samuel Harris, the respondent, an employee of the debtor, was certified to be suffering from silicosis, an industrial disease within the meaning of the Workmen's Compensation Act, 1925, and in respect thereof he was, at the date of the execution of the deed, entitled to and in receipt of compensation under that Act at the rate of 1*l.* 3*s.* 10*d.* per week. Shortly after the deed was executed, the solicitors for the respondent wrote to the trustee, the appellant, and after some negotiations had taken place, the solicitors to the trustee wrote on May 22, 1933, to the respondent's solicitors: "Adverting to our conversation with you some little time ago. We have now heard from the trustee of the deed of assignment executed by Mr. Shenton, and he instructs us that Harris's claim to compensation is being treated by him as a preferential claim and that in accordance with the suggestion made at our interview with you, Harris will be paid his present weekly compensation until some further arrangement is made between us." Further correspondence took place between the parties, and on June 7, 1934, the appellant's solicitors wrote to the respondent's solicitors that, on the advice of counsel, their client did not intend to continue payments of compensation to the respondent, and was not prepared to admit his claim to preferential treatment. A lengthy correspondence followed, and finally the appellant issued this summons, which raised the question whether the respondent was a creditor entitled to the benefit of the trusts and provisions of the deed of assignment and, if so, whether he was entitled to any preferential payment. The county court judge held in favour of the respondent, and ordered that the appellant should admit the respondent as a creditor under the deed and treat him as a preferential creditor pursuant to s. 17 of the Deeds of Arrangement Act, 1914, as if the estate of the debtor were being administered in bankruptcy. The trustee appealed from that order on the following grounds: (*a*) that the deed of assignment did not contain any direction or trust to pay debts which would be preferential debts in bankruptcy; (*b*) that the respondent was not entitled to be treated as a preferential creditor under the deed of assignment, either by virtue of s. 17 or otherwise; and (*c*) that the court had no power to order the claim of a creditor under the deed to be treated as if the debtor's estate were being administered in bankruptcy.

The appeal now came on for hearing.

Allan Walmsley for the appellant. This is an application under s. 23 of the Deeds of Arrangement Act, 1914. The county court judge has not answered the question whether the respondent is entitled to any preferential treatment. The real question is whether this case comes within the deed of arrangement. The deed contained no provision under which the trustee could treat anyone as a preferential creditor. Therefore the Court cannot alter the fact that the trustee would commit a breach of trust if he treated the respondent as a preferential creditor, and the county court judge exceeded his jurisdiction.

J. Leonard Stone for the respondent. This is a very important matter for the whole structure of the Workmen's Compensation Act, 1925. If the argument advanced on behalf of the appellant is correct, employers could defraud their employees of their rights to compensation under the Act.

The trustee could effect a compromise under s. 15 (*f*) of the Trustee Act, 1925, and he was entitled to do what he undertook to do in the letter of May 22, 1933. That makes his solicitors' letter binding on him.

Walmsley in reply. For a trustee to admit a claim is not a "compromise" within the meaning of s. 15 (*f*).

CLAUSON J. Under the deed of arrangement the trustee prima facie would be committing a breach of trust if he recognized a preferential creditor as being preferential and paid him in priority over other creditors; he would be committing a breach of trust so far as the deed was concerned, because there is no provision in the deed which enables him to do that. I mention, though I do not think it is strictly relevant to this matter, that there is a provision in s. 17 of the Deeds of Arrangement Act, 1914, which provides that a trustee who makes a payment which would be justified in bankruptcy is not committing a misdemeanour, whereas trustees who make certain other payments not authorized by the deed may be guilty of a misdemeanour. That does not throw light in itself upon what would or would not be a breach of trust, and it must be taken on the terms of this deed, and it is on this footing that I give this judgment, that to pay a preferential creditor by way of preference would be a breach of trust. [His Lordship dealt with facts, and continued:] On the construction of the letter of May 22, 1933, in the circumstances which have arisen, I am of opinion that there was an agreement between the trustee and the workman that, on the terms that the workman assented to the deed, he was to be treated as a preferential creditor in respect of his claim under the award on precisely the same footing as if the affairs of the debtor were in bankruptcy. If I am right in treating that as the true construction of the letter, then in my view that arrangement is an arrangement which is binding upon the trustee and upon the creditors, because, although it is not expressly justified by the terms of the deed, it is justified by the addition to the deed which is in effect made by s. 15 of the Trustee Act, 1925. For the purposes of that section the trustee of a deed of arrangement is by virtue of s. 3 of the Law of Property (Amendment) Act, 1926, to be treated as a trust corporation: and accordingly the effect of s. 15 of the Act of 1925 is that he may if and as he thinks fit (*f*) "compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the . . . . trust; and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith." On the construction which I give to that letter the arrangement which was made between the trustee and the workman amounted, in my opinion, to an arrangement which was justified by sub-clause (*f*). If that be so, to carry out that arrangement is no breach of trust and the trustee is now bound to carry it out, and, accordingly, to treat the workman as a preferential creditor.

The way in which the matter comes before us is this: That arrangement having been made, at some later date the trustee was advised, or it may be that some of the creditors took the view, that it was an arrangement which ought not to be carried out and that the workman ought to be relegated to the position of an ordinary creditor without any preference. With a view to bringing the matter to an issue, which was quite a proper and reasonable thing to do, the trustee took out a summons under the Deeds of Arrangement Act before the proper court asking for the determination of the following question—namely, whether the workman "is a creditor entitled to the benefit of the trusts and provisions of the said deed of assignment and if so whether he is entitled to any preferential payment." The county court judge ordered: "that the trustee do admit the said Samuel Harris as a creditor under the deed and treat him as a preferential creditor pursuant to s. 17 of the Deeds of Arrangement Act, 1914." We have not the advantage of having the reasons of the county court judge in detail; but as that order stands it appears to me not to be correct in form, because it is not by virtue of s. 17 that this workman must be treated as a preferential creditor. Sect. 17 merely protects the trustee from criminal liability if he deals with the matter in such a way as it might be dealt with in bankruptcy. That has no effect upon the civil rights of the parties. In my view the right order is to declare that, in the events which have happened, the trustee is bound to treat the workman as a preferential creditor as though the estate were being administered in bankruptcy. Accordingly in my view, the learned county court judge's judgment ought to be varied in form to that extent, but the result is in substance the same.

FARWELL J. I agree. If the arrangement which it is said was made between the trustee and the creditor be a binding arrangement, it is not one which can be justified under the deed itself. But it appears that by virtue of the Law of Property (Amendment) Act, 1926, s. 3, s. 15 of the Trustee Act, 1925, applies to a trustee under a deed of this kind. That being so, such a trustee has the powers which are given by s. 15 including a power to: (*f*) " compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust." In this case there was a claim by a creditor who had not assented to the deed that he was entitled to be paid by the debtor and it may be that failing payment or agreement he had remedies against the debtor which he could have enforced. Under those circumstances the creditor's solicitor approached the trustee and as a result of conversations the trustee's solicitor wrote to the creditor's solicitor the letter of May 22, 1932. In my judgment that letter clearly indicates that an arrangement had been come to between the trustee and the creditor as to the creditor's position. It is plain on that letter that the creditor assented to the deed. It would have been impossible, in my view, after the creditor had received that letter and had been paid the weekly sums thereby agreed, for him to have attacked the deed in any shape or form; he would have been bound by it. If that be so, if he be bound by it, equally in my judgment the trustee has bound himself, as he was entitled to do under s. 15 of the Trustee Act, to treat the creditor as a preferential creditor. That agreement was one for which there was ample consideration on both sides. In my judgment, it is an agreement which is binding on the trustee, and one which the trustee could properly enter into having regard to the provisions of s. 15. Under those circumstances the trustee is bound to give effect to the agreement which he has made.

Solicitors for the appellant: *Hancock & Willis, for Hugh W. Adams & Ellis, Tunstall, Staffs.*

Solicitors for the respondent: *Preston, Lane-Claypon & O'Kelly, for Hollinshead & Moody, Tunstall, Staffs.*

P. J. B.

HODGES *v.* JONES.

LUXMOORE J.

1935

June 5, 6, 18, 19, 20.

[1934. H. 2059.]

Vendor and Purchaser—Building Estate—Sale in plots—Production of plan of estate to prospective purchaser of plot—Representation by vendor as to particular user of adjoining strip of land—User shown on plan—Inducement to purchase—Breach of user by vendor—Alleged collateral agreement for user of strip at time of sale—Subsequent transfer of Building Estate (including strip) to Company—Company registered as Owner with absolute title—Claim for rectification—Overriding Interests—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 3, *sub-s. xvi.; s.* 20, *sub-s.* 1; *s.* 70; *s.* 82, *sub-s.* 3.

The plaintiffs were the registered owners in fee simple of a plot of land forming part of a building estate upon which plot they had erected a house. The property comprised in this title was originally the freehold property of the defendants, S. J. and E. I., who were carrying on business in partnership and who were the registered owners with an absolute title of the whole estate.

Before the purchase of the plot by the plaintiffs, a plan was produced of the proposed lay out of the estate. This plan showed (amongst other things) a small strip of land adjoining the plaintiffs' plot: that strip bore upon it the words "Tennis Courts." The plaintiffs stated that in addition it was orally represented to them by the defendants that this strip would be used only as tennis courts; and that they were therefore induced to purchase the plot.

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After the purchase the defendants S. J. and E. I. transferred their business and the whole of the unsold portion of the building estate to the defendant company, H. C. J. & Co., Ld., who were duly registered as owners in fee simple with an absolute title.

The defendants having erected three garages on the strip of land in question, the plaintiffs sought a mandatory injunction to remove them, alleging that when they purchased the plot there was a collateral agreement that this strip was only to be used as tennis courts, and that on the faith of this agreement they agreed to the purchase. This was denied by the defendants. During the action the statement of claim was amended to enable the plaintiffs to claim rectification of the defendant company's registered title by inserting therein a notice that the strip of land was affected by the restrictive agreement prohibiting the user thereof otherwise than as tennis courts:—

Held, (1.) that the plaintiffs had not succeeded in establishing the collateral agreement they alleged, and (2.) that in all the circumstances of the case there was nothing which could be considered to make it unjust not to rectify the register under s. 82, sub-s. 3, of the Land Registration Act, 1925. not rectified unless

The action therefore failed.

ACTION.

In these proceedings the plaintiffs, F. T. Hodges and his wife G. Hodges, originally claimed against the defendants, H. C. Jones, E. D. Inwards and the defendant company H. C. Jones & Co. (Surrey), Ld., an order to pull down and remove certain buildings partly or completely erected upon a certain strip of land forming part of a building estate known as the Regent Farm Estate, Surbiton, in the county of Surrey, which strip of land lay between two intended streets on the building estate to be known as "The Ridge" and "Regent Road."

The plaintiff and his wife, relying (as they alleged in their statement of claim) upon the oral representation and production by H. C. Jones & Co. of a plan showing the lay out of the building estate and that a strip of land lying between the intended streets "The Ridge" and "Regent Road" was marked "Tennis Courts," and was intended to be always kept open and only used for that purpose, decided to purchase a plot of land on "The Ridge," and erect a house thereon.

By a contract in writing dated October 6, 1925, and made between the said H. C. Jones and E. D. Inwards, trading together as H. C. Jones & Co. (therein called "the vendors"), of the one part and the first named plaintiff F. T. Hodges (therein called "the purchaser") of the other part, it was agreed that the vendor should sell and the purchaser should purchase a plot of freehold land upon the said building estate, namely the Regent Farm Estate, together with a dwelling-house to be erected thereon, to be known as plot 11, The Ridge, Surbiton, in the county of Surrey, and having a frontage to The Ridge of 53 feet or thereabouts, as shown on the vendors' block plan and subject to certain conditions set out in a schedule thereto. The conditions provided (inter alia) for the erection of the house in accordance with the plan and that on completion it was to be used as a private dwelling-house only. This house became known as No. 21 The Ridge, and in April, 1926, was transferred into the joint names of the two plaintiffs.

The following statement of facts is taken from the judgment of the learned judge:—

"The plaintiffs were, on April 21, 1926, registered at the Land Registry as the proprietors, with an absolute title, of the above mentioned freehold land and buildings in the parish of Surbiton, known as No. 21 The Ridge, the title number being Provincial Title, No. 17413. The property comprised in this title originally formed part of the estate known as the Regent Farm Estate, and had been conveyed to the first named defendants H. C. Jones and E. D. Inwards in fee simple, subject, however, to certain building and other restrictions and conditions which are not material to the present case.

On June 4, 1925, the defendants Jones and Inwards were registered at the Land Registry as the proprietors of the Regent Farm Estate with an absolute title under the title, No. P.11673. At the date of this registration they were carrying on business as builders in partnership under the style of H. C. Jones & Co., and they continued so to do until the month of March, 1931. In the course of their business they laid out roads on the Regent Farm Estate, and from time to time sold plots of land to various purchasers, and built on the plots sold houses of the size and type required by purchasers. The plots when sold were divided out of title No. P.11673. In March, 1931, the defendants transferred their business to the defendant company, H. C. Jones & Co. (Surrey), Ld., which had been incorporated for the purpose of acquiring the business and assets of H. C. Jones & Co.; and on March 27, 1931, they transferred to the defendant company the whole of the portion of the Regent Farm Estate which then remained unsold, with the exception of two small plots which it is not material to identify. The company was duly registered as the proprietor, with an absolute title, of the land so transferred. This land included a strip of land, being the strip above mentioned, lying to the rear of the houses then built in the road called The Ridge, in which the plaintiffs' property was situated, and to the road above mentioned—namely, Regent Road.

In June, 1934, the defendant company began to erect, and shortly afterwards completed, three small garages on part of this strip. The plaintiffs and other owners of houses on The Ridge and in Regent Road objected to the erection of these garages. They alleged that the defendants had committed a breach of the conditions of the building scheme affecting the Regent Farm Estate, and of the undertaking and representation given to them by the defendants—namely, that only tennis courts would be constructed on this strip of land. They alleged therefore that these buildings would cause serious loss and damage to them and gravely depreciate the value of their property by the destruction of the amenities of the neighbourhood. They therefore claimed the order above mentioned, and further sought an injunction to restrain the defendants from erecting buildings upon or using the said strip of land otherwise than as tennis courts.

The defendants denied the allegations of the plaintiffs as to the oral representations regarding the permanent retention of the strip of land for tennis courts, and they did not admit that they had showed to the plaintiffs the plan they referred to, which was stated to bear on it the words 'Tennis Courts'."

During the trial the statement of claim was by leave of the judge amended in order to enable the plaintiffs to claim rectification of the defendant company's registered title on the ground that the strip of land was affected by a restrictive agreement prohibiting the user thereof otherwise than for the construction of tennis courts.

Alexander Grant K.C. and *E. Milner Holland* for the plaintiffs. The plaintiffs are entitled to damages against the two defendants Jones and Inwards; there was a collateral agreement by these two defendants with the plaintiffs not to use this strip of land for other than tennis courts or an open space. Relying on this the plaintiffs were induced to enter into the contract. The case of *Elliston* v. *Reacher* (1) is relied on.

The agreement is one purporting to bind the land; the obligation arises from the plan produced by the two defendants. The main point is that if there is a plan, covenants are not needed. If on a plan it is shown that land is to be treated in a certain way and it is produced, the plan binds the land. It enures for the benefit of every purchaser of a plot: see *Tindall* v. *Castle.* (2)

The defendant company acquired the estate laid out for building on the transfer to them. They therefore took the strip of land in question with notice of the restriction affecting it. It is admitted that a difficulty arises by reason of the Land Registration Act, 1925, and the registered title of the company, and for this reason the statement of claim was amended against the company. The register ought to be rectified by inserting thereon that the company took with notice of this restriction affecting the strip. It may well be that the collateral agreement is an "overriding interest": see s. 20, sub-s. 1 (*b*), of the Land Registration Act, 1925, and s. 3, sub-s. xvi., of the same Act.

J. F. Marnan for the two defendants H. C. Jones and E. D. Inwards.

W. P. Spens K.C. and *E. Sachs* for the defendant company. No question of a building scheme arises here and the cases

(1) [1908] 2 Ch. 374.

(2) (1893) 62 L. J. (Ch.) 555.

dealing with building schemes do not apply. If, as the plaintiffs allege, a contract was entered into, it must be strictly proved.

With regard to the rectification of the register sought, the effect of s. 20, sub-s. 1, of the Land Registration Act, 1925, is to confer on the registered owner (in this case the company), when registered with an absolute title in a freehold estate, an estate in fee simple subject (among other burdens) to overriding interests. These are defined in s. 3, sub-s. xvi., and it cannot be said that the collateral agreement relied on by the plaintiffs constitutes an "overriding interest." See also s. 70 of the Act. The section permitting the register to be rectified is s. 82, and see especially sub-s. 3. As to the Court's power to rectify the register, see the case of *Chowood, Ld.* v. *Lyall* (2.) (1) The fact that the defendant company have had a registered title for many years affords a complete answer to the plaintiffs' claim.

As to the plaintiffs' contention that the production of a plan of the proposed lay out constituted an obligation on the part of the defendant company to construct tennis courts, the plan is not sufficient by itself to constitute a contract: see *Feoffees of Heriot's Hospital* v. *Gibson* (2); *Squire* v. *Campbell* (3); *Whitehouse* v. *Hugh* (4); *Tucker* v. *Vowles* (5); these last two being cases of building schemes.

There is nothing here to show that the estate was intended to be laid out according to a building scheme. No evidence has been shown of any form of restrictive obligation binding the land in the hands of the defendant company. No case for rectification has been made out; and the registered title of the defendant company is relied on.

Alexander Grant K.C. in reply.

LUXMOORE J. [after stating the facts as set out above, continued:] the original claim was for a mandatory injunction ordering the defendants to remove the garages and an injunction to restrain the defendants or any of them from erecting garages or other buildings upon or otherwise using the said strip of land except for the purpose of laying out the same as tennis courts, and there was a claim for damages. After the plaintiffs had opened their case, Mr. Grant asked for leave to amend his statement of claim in order to enable him to claim rectification of the defendant company's registered title by inserting therein notice that the strip of land is affected by a restrictive agreement prohibiting the user thereof otherwise than for the construction of tennis courts. I allowed the plaintiffs to make the necessary amendments and reserved the question of the costs until after the evidence and arguments had been concluded.

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(1) [1930] 2 Ch. 156.
(2) (1814) 2 Dow, 301, 307.
(3) (1836) 1 Myl. & Cr. 459, 478.
(4) [1906] 1 Ch. 253.
(5) [1893] 1 Ch. 195.

The contract for sale is in writing and is dated October 6, 1925. It provides by clause 1 that the vendors, that is the defendants Jones and Inwards, will sell and the purchaser, that is the plaintiff Frank Thomas Hodges, will purchase, all that plot of freehold land together with the dwelling-house to be erected thereon in accordance with the particular plan which is mentioned, and to be known as plot No. 11 The Ridge, Surbiton, in the county of Surrey; and having a frontage to The Ridge of 53 feet as shown on the vendors' block plan, subject to but with the benefit of the conditions set out in the schedule thereto. The schedule provides that the vendors will build the house in accordance with the plan and so on. Clause 3 provides as follows: "The premises sold are to be used as a private dwelling-house only and not for any advertising purposes or for any trade manufacture or business but this shall not preclude the carrying on of a learned or artistic profession without outward indication thereof except the fixing of a brass or other plate not more than 2 feet by 1 foot." Then there is a provision that no structural alterations or additions to the premises shall be made without the written consent of the vendors. It will be observed that the contract contains no reference to the strip of land, nor is there any agreement by the defendants, Jones and Inwards, to the effect that the strip shall not be used for any other purpose than the construction of tennis courts, and the transfer follows the contract and there is no reference on the register to any such restriction in respect of this strip.

The case put forward on behalf of the plaintiffs is that there was a collateral agreement by the defendants, Jones and Inwards, with the plaintiffs that the user of the strip should be so restricted; and that this collateral contract induced the plaintiffs to enter into the contract to purchase No. 21 The Ridge. They claim that the defendants, Jones and Inwards, have broken this collateral contract and that they are liable in damages for such breach.

It is difficult to understand what the precise case against the defendant company is. I hope I am not misstating it or doing it any injustice, but so far as I have been able to appreciate it, it is this. The Regent Farm Estate was laid out under a building scheme which included, among other things, a restriction on the user of the strip except for tennis courts. The defendant company acquired the strip with notice of this restriction and are bound by it. The plaintiffs' counsel realized the difficulties caused by the provisions of the Land Registration Act, 1925; and it was for this reason that they asked for leave to amend the claim by asking for rectification of the land register by inserting notice of the alleged restriction against the appropriate registered title of the defendant company.

The first question to be determined is whether there was any such collateral agreement between the defendants, Jones and Inwards, on the one part, and the plaintiffs or either of them on the other. The facts material to be considered are as follows. At the beginning of September, 1925, the plaintiffs were engaged to be married and were looking for a suitable house in which to start their married life. Mrs. Hodges heard of the Regent Farm Estate, and she took Mr. Hodges to look at it. In the result Mr. Hodges wrote to H. C. Jones & Co. for particulars of the estate; he got no answer to the letter—there was some mistake or other—and he had a telephone conversation with them. As the result of this telephone conversation on September 8 or 9, he received a letter dated September 8 from H. C. Jones &

Co. So far as material it refers to the telephonic conversation and goes on to state that they enclose particulars "of our semi-detached houses being erected at Regent Farm Estate, Surbiton, on plots 33 feet frontage by 120 feet depth, backing on to estate tennis courts, and trust you will favour us with an appointment at Surbiton, to discuss details and inspect the site. At the time of writing we unfortunately have no copy of the site plan available, but would mention that plot 2, Regent Road, with semi-detached 3-bedroomed house is unsold, and on 'The Ridge,' the second road in the estate, plots 6 and 7 are unsold, also from plots 10 to the end of that road." Shortly after this, Mr. and Mrs. Hodges interviewed Mr. Inwards in a temporary office on the estate. Mr. and Mrs. Hodges were shown a lay-out plan on which the estate was shown as bounded by Regent Road, The Ridge, The Ridings, Surbiton Hill Park and Berrylands. There has been some difficulty with regard to this plan, but I think it is common ground that this plan showed on it a strip of land running from the Surbiton Hill Park to the road called Berrylands and between the two roads, The Ridge and Regent Road, and that the words "tennis courts" were written on this strip. Mr. Hodges and his wife both said that they were assured by Mr. Inwards that the whole of this strip would be laid out as tennis courts. On September 21, 1925, Mr. Hodges wrote to Mr. Inwards a letter in which he asks for particulars of the houses on the Regent Farm Estate. It says: "You will no doubt remember me as visiting the estate on Saturday afternoon, September 12, and keeping you rather late. I am rather keen to get this matter settled." Then he asks a number of questions which are set out in numbered paragraphs from (1.) to (5.)—I need not refer to them—but it is to be observed that no mention is made in this letter of the tennis courts, no question is asked as to when or by whom they are to be constructed or by whom they are to be kept up or who is to have the right of playing on them. This letter was answered on September 22, and on October 3 Mr. Hodges wrote to Mr. Inwards confirming an appointment for October 6. This appointment was apparently kept, and it was either at the interview of that date or perhaps on some day before it that Mr. and Mrs. Hodges say that they saw Mr. Jones and Mr. Inwards; and that at that interview Mrs. Hodges asked whether—if the tennis courts were not made up—the strip would be built on, and that in answer Mr. Jones said that nothing of the sort could happen, for—even if he wanted to build on it—the council would not allow him to do so. This question and the answer seem to me to point to the fact that no definite agreement by H. C. Jones & Co. to construct tennis courts was mentioned to the plaintiffs at this time.

The contract was signed on October 6. As I have already said, there was nothing in it about the strip, and it is certainly difficult to understand—if the construction of the tennis courts was a matter of importance to the plaintiffs at that time—why nothing was put into the contract about it; obviously nothing was said about it by the plaintiffs to their solicitor, either at this time or before the transfer was prepared and registered, for the transfer is silent on the matter. Mr. Inwards and Mr. Jones both frankly admit that they have not a very clear recollection of what took place at the several interviews, and it is certainly plain that Mr. and Mrs. Hodges' memory is not completely accurate in every respect; no one would expect it to be so having regard to the very long time which has elapsed since the interviews in question took place—it is nearly ten years ago. Mr. Jones says that as far as his recollection goes, he did not see either the plaintiff or his wife until after the contract had been signed, certainly the correspondence which took place before that was always with Mr. Inwards.

I am quite satisfied that each of the witnesses to whom I have referred has tried to the best of his or her ability to give honest and truthful evidence; this applies equally to both the plaintiffs and to the defendants, Mr. Inwards and Mr. Jones. The plaintiffs tendered evidence by other witnesses who had purchased plots of land on the Regent Farm Estate from H. C. Jones & Co. This evidence was objected to by the defendants as being inadmissible. I allowed it to be given

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de bene esse, but in my judgment the defendants' objection is well founded and I therefore pay no attention to that evidence.

It is well settled that in cases where there is a written contract there may also be a collateral parol contract which induced it and that such a collateral parol contract, if established, may be enforced; but, as was pointed out by Mellish L.J. in *Erskine* v. *Adeane* (1), such an agreement must be closely watched. What he said was this: "No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved. Indeed I may say that this being a case between landlord and tenant, if there had been no evidence except Mr. Bennett's own evidence, and the agreement had been alleged to have been made in an interview between him and Mr. Adeane when nobody else was present, I should have probably thought it would have been the duty of the Court to say that this was not satisfactory enough for the Court to act upon." But collateral contracts of that kind are, I think, necessarily uncommon. I refer to what was said by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* (2): "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full

(1) (1873) L. R. 8 Ch. 756, 766.

(2) [1913] A. C. 30, 47.

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the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100*l.*, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

In the present case one would naturally expect to find the restrictions with regard to this strip referred to in the written agreements if the plaintiffs attached so much importance to them at the time as they now appear to do. It is always difficult to determine in cases of this kind, whether the representation alleged to have been made was one of fact or only one of intention. One of the most important guides in coming to a conclusion is whether there is a clear definition of what is to be done or whether the whole matter is left without any definition. In the present case there is no suggestion how the tennis courts were to be constructed, at whose expense they were to be kept up, or what persons were to have the right to use them. Mr. Jones and Mr. Inwards frankly admit that they intended to make tennis courts on this strip. They say they never intended to make more courts than were required to meet the demand. They made one court shortly after the place was built. No complaint was ever made that they had not constructed more courts. A second court was made in 1932. On

September 10, 1926, H. C. Jones & Co. sent out a circular letter to the various owners of houses in The Ridge and Regent Road, including the plaintiffs, offering parts of the strip for the purpose of a private tennis court or extension of gardens. No objection was made to this by any of the owners of the houses in The Ridge or in Regent Road. Indeed two of the owners bought small portions of this strip and those portions were transferred free of any restriction.

After a careful consideration of the admissible evidence, the plaintiffs have failed to satisfy me that there was any such collateral agreement as they allege, and that being so the action must necessarily fail against the defendants.

Great reliance was placed on the letter of September 8, 1925, and it was argued that this alone coupled with the plan with the words "tennis courts" on the strip, was sufficient to constitute the collateral contract; but as I have already pointed out, if a contract is to be established, its terms must be sufficiently clear to enable it to be enforced. In my judgment the letter and plan fall far short of what is required in cases of this kind; and for this reason, I think the present case is distinguishable on facts from the decision in the case of *Jameson* v. *Kinmell Bay Land Co.* (1) Mr. Grant also placed some reliance on the plan and argued that it was of itself sufficient to establish the collateral contract, and on this point he relied on the decision of North J. in *Tindall* v. *Castle.* (2) It may well be that the evidence in that case was sufficient to justify the decision, but if that case is relied on as establishing the proposition that the exhibition of a plan can by itself amount to a representation that the particular method of laying out or dealing with the land delineated on it must be followed without variation, it seems to me to be contrary to many other decisions which are binding on me. Lord Eldon in the case of *Feoffees of Heriot's Hospital* v. *Gibson* (3) considered that it was perfectly wild to say that the mere exhibition of a plan was sufficient to form a binding contract, and in *Child* v. *Douglas* (4), where the land had to be laid out for building purposes and a plan of the land on which the buildings alone was drawn was shown by the vendor to the plaintiff, the Court were so doubtful whether there was any general scheme that an injunction was refused. I refer also to the decisions in *Whitehouse* v. *Hugh* (1) and *Tucker* v. *Vowles*. (2)

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(1) (1931) 47 Times L. R. 410, 593.

(2) 62 L. J. (Ch.) 555.

(3) 2 Dow, 301, 307.

(4) (1854) 5 D. G. M. & G. 739.

I should however add that if (contrary to the view I have expressed) I had come to the conclusion that there was a collateral agreement between the plaintiffs and the defendants, H. C. Jones & Co., the plaintiffs could not in my opinion claim any relief in respect of it against the defendant company. The defendant company purchased in March, 1931, for valuable consideration from the owners registered with an absolute title. The result of the transfer to the defendant company, followed by registration, was to confer on the company an estate in fee simple in accordance with the provisions of s. 20 of the Land Registration Act, 1925. Sect. 20, sub-s. 1, provides that, in the case of a freehold estate registered with an absolute title, a disposition of the registered land for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple—I am reading it shortly—"together with all rights, privileges, and appurtenances belonging or appurtenant thereto, ... subject—(*a*) to the incumbrances and other entries, if any, appearing on the register; and (*b*) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created, but free from all other estates and interests whatsoever, ..." There is no entry on the register restricting the user of the strip to tennis courts or preventing the erection of any building upon it, and it is quite impossible to suggest that the collateral agreement, if it existed, constituted an "overriding interest," which is defined in s. 3, sub-s. xvi., as meaning: "all the incumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect, and in regard to land registered at the commencement of this Act include the matters which are by any enactment

(1) [1906] 1 Ch. 253, 260.

(2) [1893] 1 Ch. 195, 208.

repealed by this Act declared not to be incumbrances." These incidental rights and interests are set out in s. 70 of the Act, and I think it is impossible to bring such a collateral agreement as alleged in this case—assuming that it had been proved to exist—within any of the headings in s. 70. Notice of the existence of a restriction which is not registered does not affect the property alleged to be subject to it. It is plain that unless there is rectification there could not be any relief against the defendant company.

Is there any ground for rectification? Sect. 82, sub-s. 3, of the Land Registration Act, 1925, provides that: "the register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession—(*a*) unless such a proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; or (*b*) unless the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void"—the claim cannot be brought under either of those heads—or (the last head) "(*c*) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him."

In the present case I think it would be impossible to hold that it would be unjust not to rectify the register against the defendant company. Indeed, no serious argument has been put forward on which to base this claim. In my judgment the action fails against all the defendants and must be dismissed with costs. The costs of and occasioned by the amendment will, of course, be included in those costs.

Solicitors: *Wilkinson, Howlett & Moorhouse; Latey & Latey.*

A. R. T.

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ODHAM'S PRESS, LIMITED *v.* LONDON AND PROVINCIAL SPORTING NEWS AGENCY (1929), LIMITED.

[1934. O. 1101.]

Copyright—Horseracing—Starting prices—Transmission by telephone of prices ascertained by plaintiffs' employees—Subsequent publication on racecourse—"Literary work"—News—Not subject-matter of copyright—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1, *sub-s.* 2; 24, 31, 35.

The starting prices or final betting odds on horses engaged in horse-races were ascertained, agreed, and noted down at the start of each race by two journalists employed by the plaintiffs working together from information collected on the course from bookmakers and others, and after the result of the race were communicated to a representative of the Press, then to bookmakers, and then publicly announced on the course:—

Held, that the entries in the notebook of starting prices were not a literary compilation and therefore not the subject of copyright within the Copyright Act, 1911.

WITNESS ACTION.

The first-named plaintiffs as owners respectively of Sporting Life and Sporting Chronicle, claimed to be joint owners of the copyright in the starting prices or betting odds, at the fall of the flag, fixed by their representatives on the racecourse immediately after the start of any horserace in Great Britain or Ireland, and that it was an infringement of such alleged copyright for the defendants, the London and Provincial Sporting News Agency (1929), Ld., to record or reproduce them in any material form for the purposes of transmission and/or to transmit them by telephone or otherwise to their subscribers for reward or otherwise to communicate the starting prices systematically to other persons by way of trade. The plaintiffs further claimed damages for alleged infringement of copyright.

The defendants pleaded that the starting-price odds were ascertained by two journalists, one on the staff of the Sporting Life and the other on the staff of the Sporting Chronicle, that those journalists had access to the books of a leading bookmaker or bookmakers showing the odds actually given on bets taken at the fall of the flag, and that those starting prices were ascertained for the information of all concerned and given by the journalists to a representative of the Exchange Telegraph Company, Ld., and to bookmakers' runners, and, shortly after each race, were publicly posted on a board on the course. The defendants denied that copyright subsisted or could subsist in the said starting prices or any of them, or belonged to the two first-named plaintiffs, or that the other plaintiffs—namely, the Press Association, Ld., the Exchange Telegraph Company, Ld., and the Central News, Ld., or any of them—had any interest in the starting prices. The defendants further said that the starting prices were not original literary works within the Copyright Act, 1911, but constituted an item or items of news available for all concerned, and particularly for those interested in starting-price betting on horseraces. The defendants admitted that they carried on business as distributors of racing news from Blower House, Poland Street, and that they offered to give their subscribers the starting prices of the first three horses past the post.

The facts are stated fully in the judgment.

Lionel Cohen K.C., *H. D. Samuels* K.C., and *E. J. Macgillivray* for the plaintiffs. On the facts the defendants have committed a breach of the plaintiffs' copyright, by telephoning to their London office, making copies of the starting prices and re-telephoning them to their subscribers. The defendants at first offered to pay the plaintiffs 500*l.* per annum for this information, but the offer was refused. Since then the defendants have obtained the earliest information as to the starting prices by their own methods and have been circulating it to their subscribers.

The plaintiffs have to prove three things: (1.) that the starting prices are copyright; (2.) that they are the owners of the copyright; (3.) that the defendants have infringed that copyright. It may be that news as such is not copyright, but a compilation or list of figures may be the subject of copyright: see *Trade Auxiliary Co.* v. *Middlesbrough and District Tradesmen's Protection Association* (1) (list of bills of sale); *Weatherby & Sons* v. *International Horse Agency and Exchange, Ld.* (2) (list of brood mares); *Exchange Telegraph Co., Ld.* v. *Gregory & Co.* (3) (list of Stock Exchange prices); *Blacklock (H.) & Co., Ld.* v. *Pearson (C. Arthur), Ld.* (4) (index of stations in Bradshaw's Time Tables); *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.* (5) (radio programmes).

The reproduction of a single copy is sufficient to constitute an infringement of copyright: *Chappell & Co.* v. *Columbia Graphophone Co.* (6) The defendants have no right to copy from the figures posted up on the board on the course for the purpose of competing with the business of our licensees. The starting prices are announced on the board purely for the information of persons present on the course, and under a limited licence.

Under s. 35 of the Copyright Act, 1911, performance means an acoustic representation of a work. The communication by telephone to the defendants' subscribers amounts to such a performance. The subscribers are mostly starting-price bookmakers. Publication to bookmakers who are prepared to pay for it is a more serious infringement than publication to members of a club, as in *Harms (Incorporated), Ld., and Chappell & Co.* v. *Martan's Club, Ld.* (7) Broadcasting by wireless telephony may be an infringement of copyright: *Messager* v. *British Broadcasting Co.* (8); *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (9)

Hon. S. O. Henn Collins K.C., J. W. Morris K.C., J. P. Eddy and *L. R. Dunne* for the defendants. There is no evidence that the defendants have ever written down anything which could possibly be a "literary work" the subject of copyright. We do not know what the "work" is for which copyright is claimed. The figures of the starting

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(1) (1889) 40 Ch. D. 425.
(2) [1910] 2 Ch. 297.
(3) [1896] 1 Q. B. 147.
(4) [1915] 2 Ch. 376.
(5) [1926] Ch. 433.
(6) [1914] 2 Ch. 745, 750.
(7) [1926] Ch. 870.
(8) [1927] 2 K. B. 543.
(9) [1934] Ch. 121.

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prices are news collected on the course by racing journalists from bookmakers and betting men. There is no copyright in news, only in the literary form in which it may be published, and here there is no literary form.

[EVE J. referred to *Exchange Telegraph Co., Ld.* v. *Gregory & Co.* (supra).]

That was the case of a list of Stock Exchange prices compiled in a proper order, a work involving considerable skill. Here there is a distinction between the effort of collecting the information required, which may be considerable, and the putting of it down on paper.

We submit that these figures, which are published to the world within a few minutes of being ascertained, are not the subject-matter of any copyright in the plaintiffs which the defendants have infringed.

[Counsel also referred to *Springfield* v. *Thame* (1); *Walter* v. *Steinkopff* (2); and *Boosey* v. *Whight.* (3)]

Lionel Cohen K.C. in reply. The plaintiffs are entitled to the declaration they seek, merely on the attitude adopted by the defendants in the correspondence. The starting prices are valuable information in which the plaintiffs have a common law right of property: *Exchange Telegraph Co., Ld.* v. *Howard.* (4) The plaintiffs in that and other cases, such as *Exchange Telegraph Co., Ld.* v. *Gregory & Co.* (5), had to rely on the common law right, because under the former Copyright Act, 1842, there was no copyright recognized in unpublished matter; now there is under the Act of 1911.

[EVE J. Where do you say is the writing in this case?]

In the witness Meads' notebook, recording the ascertained or agreed starting prices against the list of horses.

[*Henn Collins K. C.* referred to s. 31 of the Copyright Act, 1911.]

Under s. 35, sub-s. 1, of the Copyright Act, 1911, "literary work" includes maps, charts, plans, tables and compilations. The starting prices are a compilation of figures from the

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(1) (1903) 89 L. T. 242; 19 Times L. R. 650.

(2) [1892] 3 Ch. 489.

(3) [1900] 1 Ch. 122.

(4) (1906) 22 Times L. R. 375.

(5) [1896] 1 Q. B. 147.

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bookmakers' books. The same figures would not be exactly found in any one bookmaker's book, for where there is any difference in the figures the average is taken.

[Counsel also referred to *Hollinrake* v. *Truswell.* (1)]

EVE J. In this case the plaintiffs claim two declarations, the one that they " are joint owners of the copyright in the starting prices or betting odds at the fall of the flag fixed by their respective representatives on the racecourse immediately after the start of any horserace in Great Britain or Ireland," and the other " that it is an infringement of the plaintiffs' copyright in the said starting prices for the defendants to record or reproduce them in any material form for the purpose of transmitting them and/or to transmit them by telephone or otherwise to their subscribers for reward, or otherwise to communicate the said starting prices systematically to other persons by way of trade."

In order to establish their right to those declarations the plaintiffs must show that the matter in respect of which they are claiming relief is matter in which copyright can subsist. I accept, because they are not only alleged in the statement of claim but have been corroborated by Mr. Edward Dawson and Mr. Walker Meads [the representatives on the course of the Sporting Chronicle and the Sporting Life respectively], who have given evidence on behalf of the plaintiffs, the facts substantially as they are stated in the first seven paragraphs of the statement of claim.

From those paragraphs it appears that it is important for the plaintiffs, with a view to prompt attention to the persons who resort to them for the purpose of speculation, and for calculating and making up the results of a number of bets the odds of which are not stated at the time when the bets are made, to have, as soon as possible, a statement of what has taken place in the course of the race, which were the first three horses placed in the race, and what was the starting price of each of those horses. To obtain that information as quickly and as accurately as they can they

(1) [1894] 3 Ch. 420.

have employed, (at substantial salaries) the two men who appeared here and explained what was done.

In substance it is this: They turn up at the racecourse to which they are assigned for duty on any particular occasion, and when business begins they make it their concern to go to Tattersall's Ring—they do not operate in the Silver Ring, but in Tattersall's Ring—where, consequent upon the long years which they have spent in visiting racecourses, they are well known to, and, I have no doubt, much respected by, the bookmakers, the " blower " (the defendants' organization), and all frequenters of the racecourses. They go there, and their business is to collect as much information as they can about the betting that is going on, to record it, and in due course to transmit the result to their employers.

When the time comes for the recording, the two men, each representing one of the plaintiffs, compare the results of what they have heard and seen in the various parts of the ring which each of them has visited, and in a very large proportion of the cases, probably in ninety-nine cases out of a hundred, these men, so accustomed to picking up this information, so knowledgeable, and so agreeable in extracting information from all and sundry with whom they are associated, have come to the same conclusion as to what ought to be put down and properly recorded as the starting price of each horse in the race. If they do not agree they do what arbitrators sometimes do, they add their findings together and divide the result by two, thereby, as they say, coming to what they regard as a fair and just result. They operate as a check on one another's figures, and if any great discrepancy occurred in any particular return they would naturally themselves want to know whether that was an exceptional bet, whether there were some circumstances which would justify them in taking no notice of that particular instance. But in the main, having gone round, having ascertained who was there, and having found out what sort of contribution the " blower " had to make, they arrive without any difficulty, in ninety-nine cases out of a hundred, at the same result. Then one of them writes down on a piece of paper—I have not seen a specimen of it anywhere—what the result is. They put down 1, 2, and 3, the names of the first three horses, and in each case the starting price of the horse when the flag started the race.

Now the question which then arises is: What is there which can properly be made the subject of copyright in the document to which birth is given by these peregrinations round the ring and this examination of the contents of the bookmakers' books? It is said that each of these men is armed with his own book, and in it, according to well-settled custom, there is to be found on the particular day in question a list of the horses entered to run in each race, and sometimes when the field is a large one one can appreciate that there is a great deal of work to be done for the purpose of selecting which of the numerous horses can really be treated as being within the possibility of victory; and all the horses which are likely to do anything must be carefully watched with regard to the fluctuations in the prices which take place, more especially as the start of the race approaches. I can well understand that it is a very hot job, and a very thirsty job, and a very tiring job for a certain period of time; but a rest comes when the flag has fallen, and all that they have then got to do is to wait and see which horses have been placed and their respective starting prices. Ultimately they put down the starting prices of all the horses, but the important information is the names and starting prices of the first three horses, and as they do not always know what horses will be in the first three it is necessary for them to do a great deal of work which is not very fruitful in the way of results, in so far as it is not confined to the three successful horses. One may see, looking at Mr. Meads' book, which is the one I have before me, that in some cases there have been a great many more bets on one or more particular horses than there have been on the rest of the field.

But the net result of the calculation which is made when the two representatives meet and the race is going on is entered in the double column at the right-hand side of the book, and one there finds the starting price not only of the horses which have been placed, but also of some others which it is quite obvious were fancied by certain backers. One gets information of the horses which have started, of the fluctuating support or opposition which they have received, and, ultimately, of the successful runners.

These books, curiously enough, when the case was opened, were not even here. Apparently so little respect was felt for these documents that they were not even brought for production at the trial; and one of the two witnesses to whom I have referred had to be sent off to Hendon for the purpose of bringing back the literary production of himself and his coadjutor, who was at that time in the witness-box.

Having described what took place before the requirements of the plaintiffs were met, I ought not to forget that immediately thereafter a large number of individuals known as bookmakers' runners and bookmakers' clerks are in the near neighbourhood of the plaintiffs' representatives with a view to picking up, if they can, at the earliest possible moment, the information on the slip of paper which contains the results of the work of the two representatives who have been visiting the bookmakers in the ring; and immediately thereupon, by telephone and by "tic-tacking" (which everybody except myself seems to understand all about), the result of what is on the paper is communicated, one may say, to the world at large. Persons on the course know it; persons on the telephone know it; it is telegraphed to the newspapers and it appears in the early editions; and it is the property of the whole world.

The advantage which, if this case was proved up to the hilt, would accrue to the plaintiffs seems to be an advantage which is crowded into something like a matter of seconds. Their representative is entitled to know from these two men the result of their investigations before anybody else. Needless to say, there are plenty of persons who are eavesdropping and otherwise trying to obtain information as to what the news is, but the time which they are kept waiting is extraordinarily short, five seconds or ten seconds —not a minute. Indeed, before many minutes are over it is again published to the world at large by the exhibition in the paddock not only of the starting prices of the horses which have been placed, but the starting prices of the horses of which one may say that they "also ran." The whole thing, in my opinion, depends on the question whether or not the entries in these books or the scrap of paper mentioned by Mr. Dawson constitute a series of literary works in the nature of tables or compilations, and it is on the allegation that they do that the plaintiffs rest their claim to the declarations asked for.

In my opinion, it is impossible to say that these are literary works in the nature of tables or compilations made by these investigators. They are notes of what they see or hear as they pass round the ring—one in one part of the ring and the other in another part of it. They are in this sense compilations, but in large measure the information comes from an investigation of the entries in the bookmakers' books, and it also comes from other sources. One cannot have a gentleman of the geniality of Mr. Dawson visiting racecourse after racecourse without feeling certain that he became acquainted with and became very good friends with the persons who are in the fortunate position of being able to give information day after day, and it is obvious, as he frankly admitted to me, that he picked up information wherever he could. He was even a friend of the "blower" representatives, who were very material persons to be considered with regard to the particular horses which they might be fancying, and he would naturally be passing the time of day with them, and would ask them, as he admitted that he did, whether there was any news, and what they were about to do. All those questions would assist him in his final award when he met Mr. Meads, and more particularly if they had to consider some outsider which had come with a rush at the end and had got a place.

All those matters were only matters which were involved in the collection of news. Each representative was round there, seeing what he could learn, and what the results of the day were likely to be, and qualifying himself to do justice

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to the work which the company employing him had committed to his care. When one looks at what there is it is extremely difficult to see where there can be any copyright in these books or the entries therein, any more than in any note that a man might have taken to satisfy or to remind himself of what were the starting prices on a particular day.

I therefore hold that the expression "literary work," though it includes maps, charts, plans, tables, and compilations, does not include the documents on which the plaintiffs rely. In those circumstances the only thing that I can do is to dismiss the action, as I do, with costs.

Solicitors: *Nicholson & Crouch; N. A. Woodiwiss & Co.*

H. L. L.

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[1933. S. 2545.]

Administration—Deceased Solicitor's Insolvent Estate—Counsel's Fees—No right to Prove for—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub.-s.* 1; *First Schedule, Part I., r.* 2.

Counsel has no right to prove for his fees in the administration of the insolvent estate of a deceased solicitor in a case where the client reimbursed the solicitor the amount of the fees upon the faith of the solicitor's false representation that he had in fact paid them to counsel.

Further; as the executor of a deceased solicitor is not (as a trustee of a bankrupt's property is) an officer of the court, the rule followed by the Court of Bankruptcy in *Ex parte James* (1874) L. R. 9 Ch. 609—that the Court ought to be as honest as other people—will not be so extended as to give the Court jurisdiction to order the executor to refund fees to counsel.

The rules laid down in Part I. of the First Schedule to the Administration of Estates Act, 1925, do not authorize the application of the rule followed by the Court of Bankruptcy to such a case.

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SUMMONS.

The summons was taken out in a creditor's action for the administration of the estate of Henry Gilbert Sandiford, who carried on business as a solicitor under the style of Calder Woods and Sandiford until his death on November 19, 1932. The applicant, a member of the English bar and one of several others to whom the deceased solicitor owed fees, claimed to be admitted as a creditor of the estate for the sum of 84*l.* 14*s.* 6*d.* in respect of fees due to him as counsel or, in the alternative, that the defendant, the personal representative of the deceased solicitor, might be ordered to pay to him a sum equal to the dividend on that sum rateably with the other creditors, just as if he had a legal right of proof in respect of that sum.

Mr. Sandiford, having acted for clients in certain matters—namely, *In re* Mark Martin and Dent *v.* Baldwin, on June 27, 1931, in due course delivered to his client who retained him in Dent *v.* Baldwin his bill of costs amounting to 166*l.* 12*s.* 8*d.*, which contained, amongst other items, the following :—

1930.	£	*s.*	*d.*
May 13.—Attending Mr. X (that is, the applicant) with Brief		6	8
Paid his fee and Clerk	32	10	0
Attending appointing consultation . .		3	4
Paid	2	7	0
Oct. 22.—Drawing and copy Brief to Mr. X, to apply to fix date of trial . .		4	0
Paid his fee and Clerk	2	4	6
Attending him		3	4
1931.			
April 22.—Paid refresher to Mr. X . . .	21	15	0
Attending him		6	8

The said sum of 166*l.* 12*s.* 8*d.* was in due course received by Mr. Sandiford from his client in payment of his said bill of costs.

In the matter of Mark Martin, Mr. Sandiford did not render his client, Mrs. McCallum, a formal bill of costs ; but he wrote to her husband a letter stating that he had received

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on her account a sum of 2000*l.*, which he proposed to apply as follows :—

				£	s.	d.
Costs of Henry G. Sandiford				700	0	0
Disbursements :—						
Counsel's fees, Mr. X (the applicant)	£93	0	0			
Mr. Y	139	3	0			
Court fees	38	12	6			
Accountants' charges	120	0	0			
Travelling and incidental expenses	25	0	0			
				415	15	6
				£1115	15	6
Less :—						
Amounts received on account	125	0	0			
Taxed costs received out of estate	558	11	4			
				683	11	4
				£432	4	2

Mr. Sandiford retained the 432*l.* 4*s.* 2*d.* out of the 2000*l.* and paid his client the balance of 1567*l.* 15*s.* 10*d.* In respect of the sum of 93*l.* stated to be due to the applicant, Mr. Sandiford paid to the applicant two sums amounting together to 61*l.* 12*s.*, and on May 28, 1931, paid a further sum of 5*l.* 10*s.*, leaving a balance of 25*l.* 18*s.* due to the applicant on account of his fees in that matter. In the result, there was due to the applicant in respect of his fees in the matter of Mark Martin the said sum of 25*l.* 18*s.*, and in respect of his fees in Dent *v.* Baldwin the sum of 58*l.* 16*s.* 6*d.*, making in the aggregate the sum of 84*l.* 14*s.* 6*d.*

Those bills were paid by the clients to Mr. Sandiford, as Clauson J. in his judgment found as a fact, upon the faith of Mr. Sandiford's representation to them that he had actually paid to the applicant his fees in respect of those matters ; whereas, instead of having paid them, he had kept them for himself.

Upon the adjudication of the applicant's claim before the Master, the defendant admitted payment of the amount of the fees to Mr. Sandiford by his clients. The Master disallowed the claim on general principles of law irrespective of the question whether or not Mr. Sandiford had been supplied with funds by his clients to enable him to pay counsel's fees. The Master postponed his certificate pending the decision of the Court on the present summons taken out by the applicant for leave to prove.

G. P. Slade for the applicant. The amounts paid by his clients to Mr. Sandiford in respect of counsel's fees, although they were included in the larger amounts paid in satisfaction of his bills of costs, can be followed into the hands of the solicitor, with the result that Mr. Sandiford came into the position of a trustee of those sums on behalf of the applicant, and was liable to account to the applicant for them. The executrix of Mr. Sandiford, the defendant in the action, is in a sense an officer of the Court and the rule applied in *Ex parte James* (1) ought to be applied in the present case: *Administration of Estates Act*, 1925, s. 34. (2)

It is stated in Halsbury's Laws of England, 2nd ed., vol. 2, p. 517, para. 700: "If a solicitor who has received a specific sum to pay counsel's fees does not pay them and becomes bankrupt or dies, it seems that counsel may prove for such fees in the bankruptcy, or in the administration of the estate, if it is being administered by the Court": and a case is referred to which is mentioned in "Obiter Dicta" in the Law Journal (3), where (in the course of the administration of the estate of a deceased solicitor) the Chief Clerk in the chambers of Pearson J. directed the payment of counsel's fees by the executor of a deceased solicitor : the clients who paid counsel's fees included in their solicitor's bills either did so on the representation that the fees had been paid or for the purpose of their being paid.

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(1) L. R. 9 Ch. 609.

(2) Sect. 34, sub-s. 1: "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act."

Rule 2 of the First Schedule: ". . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, ... as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

(3) 19 L. J. 309 (May 17, 1884).

[CLAUSON J. That statement does not support your case, for in your case no "specific" sum was paid to meet counsel's fees.]

The amount received by Mr. Sandiford on account of counsel's fees, was money had and received by him to the use of the applicant, which the executrix of the deceased solicitor should be ordered to pay to the applicant : *In re H. & C. Hall.* (1)

[CLAUSON J. In that case there was an admission that the solicitors received a "specific" sum in respect of the fees under a mandate by the client who paid it to apply that sum in payment of counsel's fees, fees which to the knowledge of the client had not been paid to counsel].

J. D. Casswell for the defendant. It is settled beyond question as Swinfen Eady L.J. stated in *Wells* v. *Wells* (2), that counsel's fee is not a debt but an honorarium, that fees are payable as a matter of honour and not of legal obligation ; in the same case, in delivering the judgment of the Court of Appeal, he said that the decision of the Commissioner in *In re H. & C. Hall* (1) could not be supported on the ground that counsel was entitled to recover his fees as money had and received to his use ; but, if it could be supported at all, it was on the ground that the rule in *Ex parte James* (3) was applicable to such a case. But that point was there left at large. In *Scranton's Trustee* v. *Pearse* (4) the Court held that it could not prevent the trustee from recovering moneys which he had a statutory right to recover. But, here, the applicant has no legal right whatever to recover the fees. The only ground upon which the applicant can possibly hope to succeed is by persuading the Court to extend the application of the rule of *Ex parte James* (3) followed in

(1) (1856) 2 Jur. N. S. 1076.
(2) [1914] P. 157, 162.
(3) L. R. 9 Ch. 609.
(4) [1922] 2 Ch. 87.

bankruptcy, to the case of Mr. Sandiford's executrix, the defendant in this action to administer the deceased solicitor's insolvent estate. That rule is based upon the fact that the Court of Bankruptcy has jurisdiction to order the trustee in the bankruptcy, as its own officer, to set an example to the world by paying money which he has in his hands belonging in equity to some one else, to the person really entitled to it. That rule has never yet been extended to such a case as the present, where the executrix is not an officer of the Court. Further, even assuming that the rule of *Ex parte James* (1) could properly be applied in the present case, it is necessary for the applicant to prove that the money was actually received by the defendant to this action and was earmarked for the applicants' fees. It is clear that the defendant did not receive any of the moneys from the clients. In the case of *In re Thellusson. Ex parte Abdy* (2), although the money, a specific sum, was not actually received by the trustee in the bankruptcy, it vested in the trustee as part of the bankrupt's assets by virtue of the doctrine of relation back.

CLAUSON J. This is a summons taken out in an action for the administration of the estate of the deceased by a member of the Bar, who claims to be a creditor of the estate for a sum of 84*l.* 14*s.* 6*d.*, described in the summons as being fees due to him as counsel, and he asks that he may be admitted as a creditor of the estate for the said sum of 84*l.* 14*s.* 6*d.*, or, in the alternative, that the personal representative of the deceased may be ordered to pay to him a sum equal to the dividend on the said amount rateably with the other creditors of the estate and as if he had a legal right of proof in respect of the said sum.

I will deal first of all with his claim to be admitted as a creditor in respect of that sum. The facts are these: that counsel advised certain clients through the solicitor but did not take the precaution of requiring payment of his fees before the advice was given, or before, as it was in one case, he appeared for the client in court; that at some subsequent

(1) L. R. 9 Ch. 609. (2) [1919] 2 K. B. 735.

date the solicitor received payments from the client on the representation, as I understand the facts, that he had in fact paid counsel's fees and that the client ought to reimburse him the payments he had made. In the one case, that of Dent *v.* Baldwin, it is quite plain that that was the position, because I have before me the bill of costs which was rendered to the client, which contains under the date on which the brief was delivered the entry: "Attending Counsel with brief, paid his fee and clerk," and accordingly the lay client was justified in supposing, on the delivery of that bill, that what he was being asked to do was not to provide the solicitor with money to pay counsel's fees, but to repay to the solicitor a fee which he had in fact paid to counsel. The facts are not quite so clear in the other case, of *In re* Mark Martin deceased; for what happened in that case was that the solicitor wrote to the client's husband admitting that he had received a sum of 2000*l.* on account which he proposed to apply in paying his own costs and then comes the word—which is possibly ambiguous—"disbursements." Under that heading he mentions, amongst other items, counsels' fees, with the name of the applicant and of another counsel, and the amounts of their respective fees. At that date the applicant had been paid some fees in the matter, but not nearly as much as the sum which is put down there under "disbursements." However, I think I must treat the facts of that case as the same as the facts in the first case I mentioned, and that I must attribute to the word "disbursements" as it appears in that letter, the meaning that the solicitor is in effect saying to the client: "I am going to apply the moneys by paying myself my own costs and reimbursing myself my disbursements; that is, what I have paid to the counsel." So that I propose—not that I am satisfied that it will make any difference—to treat this case as a case in which a solicitor has represented to the client that he has paid the fees, has then received from the client the amount which would reimburse him the payment that he had made, but instead of using that money to pay the fees, which he had in fact not paid, he appears, without paying the fees, to have put the money into his own pocket. Whether or not in any true sense this dishonest conduct on the part of the solicitor has had any practical result which is reflected in the quantum of his estate distributable is by no means clear, for the one transaction took place as much as thirteen or fourteen months before the death of the solicitor, and the other transaction, as I understand it, was only about a couple of months before the solicitor's death. However, in those circumstances, the first question I have to determine is: Is counsel entitled to be admitted as a creditor of the estate for the sum in question? In my view it is quite clear that between the dead man and the counsel there subsisted no obligation enforceable by the counsel at law or in equity, and accordingly it would seem very remarkable that the death of the solicitor should give the counsel a right to prove, whereas before the death he had no right to recover the sums at all. I need refer to no other case than that of *Wells* v. *Wells* (1), a decision of the Court of Appeal in 1914, which amply justifies the proposition that during the lifetime of the solicitor there was no cause of action by counsel against him at law or in equity. That being the position, it seems to me clear that the applicant cannot be admitted as a creditor.

There is, however, the alternative claim, which is "that the personal representative may be ordered to pay to him a sum equal to the dividend on the said amount rateably with the other creditors of the estate and as if he had a legal right of proof in respect of the said sum." Now that claim, which is in rather unusual form, is traceable to this, that in the case of *In re H. & C. Hall* (2), certain bankrupt solicitors admitted that they had actually received a specific sum in respect of fees payable by them on behalf of a client to counsel from their clients previously to the bankruptcy. Mr. Commissioner Fane expressed the opinion that this was sufficient to entitle counsel to prove for this sum, as money had and received to his use. The proposition put forward on behalf of the applicant in the present case was that in view of *In re H. & C. Hall* (2), he is entitled in a bankruptcy either to prove, as the Commissioner seems to have thought in that case, or to have a

(1) [1914] P. 157.

(2) 2 Jur. (N. S.) 1076.

quasi right of proof; and I will explain later by reference to the judgment of Swinfen Eady L.J. in *Wells* v. *Wells* (1)—commenting on Mr. Commissoner Fane's decision in *In re H. & C. Hall* (2)—upon what principle this quasi right, which the Commissioner allowed in that case, is based. Sect. 34 of the Administration of Estates Act of 1925 provides certain rules for the administration of a deceased person's estate where that estate is insolvent, and the rules which are applied and which are to be found in the first part of the first schedule to this Act are those which would be applied if this estate were being administered in bankruptcy. Now the relevant rule (r. 2) says: " . . . . the same rules shall prevail . . . . as to debts and liabilities provable . . . . as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt." Now if it were the law, as Mr. Commissioner Fane, if correctly reported, said, that in the circumstances of that case counsel had a right of proof, the argument would be unassailable, that in the administration of this insolvent estate the same rule as to debts provable would be applied. But *In re H. & C. Hall* (2) has been considered, and in particular has been considered in the case of *Wells* v. *Wells* (1), and the passage from the judgment in that case, which I will read in a moment, may be summarized in this way: that Swinfen Eady L.J. there indicated that the Commissioner was wrong in holding that there was a right of proof and that if the view taken by the Commissioner, as reported, is to be supported at all, it must be supported on the footing that the Court of Bankruptcy may, under certain circumstances, treat a man who has no legal right of proof as though he had such a right. Let me assume that that view is correct and that in certain circumstances, such as those dealt with in *In re H. & C. Hall* (2), counsel has what I may call a quasi right of proof in bankruptcy for his fees: I can find nothing in the rules in Part I. of the First Schedule to the Administration of Estates Act which would justify me in treating such a practice of the court in bankruptcy as being in any way applicable or extendible to the administration of a deceased's insolvent estate.

(1) [1914] P. 157.

(2) 2 Jur. (N. S.) 1076.

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The passage in the judgment of Swinfen Eady L.J. in *Wells* v. *Wells* (1), to which I referred is: "There is another case upon which we ought to say a word, that is the case of *In re H. & C. Hall* (2), which was with reference to the right of counsel to prove in bankruptcy for fees. In that case, the solicitor for the assignees of a bankrupt undertook to hand over in full to the counsel any fees which might come to the hands of the assignees." That has no application to the present case, because I am not dealing with any moneys handed over by a client to the executor of the solicitor after his death. His Lordship goes on: "But in the same case Mr. Commissioner Fane held that as regards counsel's fees received by the bankrupt solicitors before their bankruptcy, and admitted by them to have been so received, counsel could prove for this sum as money had and received to his use. This case is very shortly reported, but in our opinion the decision cannot be supported upon the ground on which it appears to have been rested. No action for money had and received would have lain against the solicitors at the suit of counsel, and no proof upon that ground could be sustained." In other words, if Mr. Commissioner Fane decided that counsel had a right of proof, he was wrong. Swinfen Eady L.J. adds: "The decision can only be supported, if at all"—those words are very significant—"on the principle of *Ex parte James* (3) that the estate of the bankrupt having been increased by the fees of counsel paid to and improperly retained by the solicitors, and this amount having been mixed with and become indistinguishable from the rest of the bankrupt's property, all that the Court can do by way of acting honestly is to order the trustee to pay to counsel a sum equal to the dividend on the amount so received, rateably with the other creditors, and as if he had a legal right of proof." Now it will be observed that Swinfen Eady L.J. takes great care not to approve the decision of Mr. Commissioner Fane even on that ground. He says it "can only be supported, if at all," on that ground. As it is not necessary for the decision of this case, I propose to speak with some caution, but I think I am justified in saying

(1) [1914] P. 166, 167.

(2) 2 Jur. (N. S.) 1076.

(3) L. R. 9 Ch. 609.

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that while the application of the principle in *Ex parte James* (1) is familiar in the Bankruptcy Court, it is a principle to be applied with the greatest caution. I do not know of any authority, and counsel has not brought before me any authority, for the proposition that such a doctrine could be applied to an executor who is not an officer of the Court. Further, it will be found on investigating the cases that the principle of *Ex parte James* (1), so far as the reported cases go, is this: that where the trustee in bankruptcy, during the bankruptcy, has received certain moneys which in the view of the Court it is not honest for him to hold, the Court will, under certain circumstances, make him refund them. There is, further, one case, *In re Thellusson* (2), where the money which the trustee was ordered to refund was not actually received by him; it was paid into the bankrupt's banking account at a moment at which, as it ultimately turned out, by reason of the doctrine of relation back, the assets of the debtor were vested in the trustee. When the trustee came into office that sum so paid to the bankrupt was in fact there, subject to some diminution occasioned no doubt by the per contra account of the bank. It was a specific sum upon which the Court could lay its hands and about which a particular order was made as appears in the report of that case. My attention at present has not been drawn to any case in which the principle of *Ex parte James* (1) has been applied so as to order a trustee in bankruptcy to return money which, before the bankruptcy began, came into and became mixed with and indistinguishable from the rest of the bankrupt's property. It is not for me to say what are the limitations in such a case of the application of the doctrine, but if my view as to the reported cases is right, it may throw some light upon the phrase used in *Wells* v. *Wells* (3), by Swinfen Eady L.J. when he says: "The decision can only be supported, if at all. . . . ." It is significant that there does not appear to have been in bankruptcy such a case as Swinfen Eady L.J. envisages at the top of page 167 of the report, where the doctrine of *Ex parte James* (1) has been

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(1) L. R. 9 Ch. 609.

(2) [1919] 2 K. B. 735.

(3) [1914] P. 157, 166, 167.

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applied, so as to order the trustee in bankruptcy to return money which, before the bankruptcy, had become indistinguishably mixed with the rest of the bankrupt's property. In my judgment it is impossible for me to apply, as I am invited to apply, the doctrine of *Ex parte James* (1), in this case.

I will leave the case with this observation only: it was suggested to me that, in bankruptcy, where it is found that a client has paid a solicitor money to meet counsel's fees and counsel's fees have not been met, there is a practice of treating counsel as though he had a provable right and paying him a dividend pari passu with the other creditors on the sum in question, and it is no doubt with a view to that that the alternative claim in the words which I have read appears in the summons. This must be borne in mind: that in those cases it must often happen that the client who has paid the money for the purpose of it being paid to counsel, or on the representation that it was to reimburse the solicitor money paid to counsel which in fact had not been so paid, might have some claim in the bankruptcy in respect of that money which had been so obtained from him; and it may be that the practice, if it exists, may be justified by this, that the client would be in a position to put in a claim to prove in respect of the moneys so obtained from him, and obviously, as a matter of ordinary business dealing, should he recover a dividend, he would hand it on to the counsel, as it was always his intention that counsel should be paid. There may be that justification for what is said to be the practice in such cases; but that justification, if it exists, does not proceed upon any principle which would enable counsel himself to prove in the administration of the estate of a deceased person. Whether that practice be right or wrong and whether that justification is sound or not, is a matter of argument. None of these considerations is, however, relevant to the present application. I find it impossible to accede to the application and can deal with it only by dismissing it with costs.

Solicitors: *Reed & Reed; Edwin Coe & Calder Woods.*

H. C. H.

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(1) L. R. 9 Ch. 609.

In re DAVIS AND COLLETT, LIMITED.

CROSSMAN J.

1935
June 5, 6.

[00306 of 1935.]

Company—Winding-up—Share capital so owned as to make company in substance a Partnership—Irregularities giving to one director complete control of company—" Just and equitable "—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 168.

By s. 168 of the Companies Act, 1929: " A company may be wound up by the court if . . . . (6) the court is of opinion that it is just and equitable that the company should be wound up."

Where the capital of a private company is so owned as to make the company in substance a partnership and one director has purported by means of irregularities to acquire complete control of the company and to exclude the other director or directors from the management of it, it may be " just and equitable " within the meaning of the section that the company should be wound up.

In re Yenidje Tobacco Co. [1916] 2 Ch. 426, considered and its principles applied.

PETITION.

This was a petition by Mr. William Humphrey Golding (hereinafter called " the petitioner ") for the compulsory winding-up of Davis and Collett, Ld. (hereinafter called " the company ") on the ground that it was just and equitable that the company should be wound up.

The company was incorporated on August 17, 1932. It had a capital of 200*l.* divided into 400 shares of ten shillings each. Mr. William Astley Cooper Davis (hereinafter called " the respondent ") and Mr. Harcourt Collett, who subsequently retired, were the first directors. On September 1, 1932, the first directors' meeting of the company was held and a resolution was passed that the respondent be appointed " chairman of the company."

On December 30, 1932, Mr. Collett resigned his directorship and later, at about the beginning of 1933 one share was transferred to Mr. F. H. le Sueur, who had been appointed a director at a meeting held on December 15, 1932, so as to give him his qualification.

On October 9, 1933, there was a meeting of directors at which the petitioner was appointed a director. Mr. le Sueur resigned, and the respondent and the petitioner became the sole directors. On February 14, 1934, the capital of the Company was increased to 400*l*. and as a result of certain allotments and transfers the petitioner and the respondent each became the holder of 400 shares of 10s. each.

On April 15, 1935, notice was given of a board meeting for April 16 at 11 A.M. The agenda of the meeting was: the confirmation of the minutes of the previous meeting. On April 16 the board meeting was held. At the hearing of this petition it was suggested on behalf of the petitioner that there was a trick played upon him with regard to the meeting, but this was denied by the respondent. At that meeting the respondent, by the exercise of his casting vote, purported to bring about the election of Mr. Desmond Davis, the respondent's brother, as a director. At that date Mr. Desmond Davis held no share in the company and therefore was not a qualified person within the meaning of the articles of the company which gave power to the directors to elect qualified persons as directors.

On April 16 a notice was given of a board meeting on April 17, at 2 P.M.; and the agenda for that meeting was: "(1.) Read and if approved confirm minutes of the last meeting; (2.) discuss and deal with banking arrangements; (3.) appointment of managing director; (4.) discuss and deal with drawing of profits; (5) any other business." The meeting was not held on April 17: it was postponed until April 18. On April 18, the meeting was held and the minutes were read. It was proposed by the respondent, seconded by Mr. Desmond Davis and carried that Mr. R. O. Cary be elected a director of the company. Mr. R. O. Cary was invited into the board room and took his seat on the board. The petitioner objected to the resolution but did not vote. Mr. R. O. Cary was not at that date qualified. Nothing was said on the agenda paper about the election of a director.

At the same meeting a resolution was passed approving a transfer of one share each to Desmond Davis and to R. O. Cary, and they were registered on the same day as holders of those shares.

The minutes of the meeting further stated that a resolution was "proposed by Mr. Desmond Davis, seconded by Mr. R. O. Cary, that Mr. W. A. C. Davis the chairman be appointed managing director of the company with full power as such, as provided in the articles of association, at a salary at the rate of 720*l.* per annum for the period of three years . . . . Mr. W. A. C. Davis refrained from voting. Mr. Golding objected to and voted against the resolution." Subsequently the respondent, purporting to act as managing director, turned the petitioner out of the room which he occupied at the offices of the company, saying that he required it for Mr. Cary, who had been appointed a director. The petitioner gave up the room.

A. F. Topham K.C. and *Arthur Sims* for the petitioner. The appointments of the respondent's brother and Mr. Cary as directors, and of the respondent as managing director, were wrong and irregular. Further, even if the respondent, as chairman of the board of directors with a casting vote, is in the position of having succeeded in excluding the petitioner from all interest in the company, the very fact that he has so succeeded is by itself, as between two persons who are carrying on the business in a quasi-partnership, a sufficient ground for a winding-up order. The proposing by the respondent of his own brother as a director at a meeting on the agenda for which nothing had been said about appointing a director was a trap for the petitioner: for, had that been included in the agenda, the petitioner could have stayed away and so prevented there being a quorum for the meeting: *Barron* v. *Potter.* (1) The petitioner's brother and Mr. Cary were not qualified for appointment as directors at the time when the resolution purporting so to appoint them was passed: *Spencer* v. *Kennedy.* (2) Everything that the respondent has purported to do by way of acting as managing director, drawing a salary of 60*l.* a month, and excluding the petitioner is quite irregular. This is a case in which the company is a private company. Of its directors, two are owners of the capital substantially in equal shares. They have

(1) [1914] 1 Ch. 895.

(2) [1926] Ch. 125.

quarrelled, and one has excluded the other, who is in the position of a partner, from his share in what may be likened to a partnership business, and has so behaved as to cause the excluded director justifiably to cease to have confidence in the manner in which he proposes to carry on the business. Those facts, even if the respondent has been acting correctly and within his rights throughout, constitute a sufficient ground for winding up a company of this kind : *In re Yenidje Tobacco Co.* (1) In that case there was a deadlock. There might be a deadlock in the present case if the respondent was wrong in claiming to act as chairman of the board of directors. Even if there is no deadlock in the present case, it is a case in which, if there was in fact a partnership and the ordinary law as to partnership was applied, there would be ground for a dissolution. In *In re Yenidje Tobacco Co.* (2) Lord Cozens-Hardy M.R., referring to the facts in that case, said : " In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position ? I think it is quite clear under the law of partnership, as has been asserted in this Court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on Partnership at p. 657, in the passage which I will read, and which, I think, is quite justified by the authorities to which he refers : ' Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.' "

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(1) [1916] 2 Ch. 426.

(2) Ibid. 426, 430.

It can be said that the maxim " de minimis non curat lex " applies to the respondent's brother's share and Mr. Cary's share. Even if the transfers to those gentlemen could not be set aside, the petitioner and the respondent are substantially the only shareholders.

The passage in Lindley on Partnership, referred to by Lord Cozens-Hardy M.R. in *In re Yenidje Tobacco Co.*, (1) occurs in the 8th edition on page 657 and in the 9th on p. 691. It is part of a longer passage which begins on p. 690 of the 9th edition, and is as follows: " The Court may dissolve a partnership on the ground that a partner wilfully or persistently commits a breach of the partnership agreement, or so conducts himself in matters relating to the partnership business that it is not reasonably practicable for his co-partners to carry on business in partnership with him. But it is not considered to be the duty of the Court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill-temper or misconduct of one or more of the partners, unless the others are in effect excluded from the concern; or unless the misconduct is of such a nature as to destroy the mutual confidence which must subsist between partners if they are to continue to carry on their business together. Where a dissolution is sought on this latter ground, it would seem that the misconduct must be such as to affect the business, not merely by shaking its credit in the eyes of the world, but by rendering it impossible for the partners to conduct their business together according to the agreement into which they have entered. Most of the cases on this subject have come before the Court on a motion for an injunction to restrain a partner from acting improperly, and have been alluded to when the remedy by injunction was considered. It may, however, be usefully observed here that keeping erroneous accounts and not entering receipts . . . . ," and the sentence continues with the words with which Lord Cozens-Hardy M.R. began his quotation.

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(1) [1916] 2 Ch. 426.

That passage states the old rule as to partnership, and there appear to have been no English cases following up and applying *In re Yenidje Tobacco Co.* (1), but that case was referred to in *Loch* v. *John Blackwood, Ld.* (2) In the Scottish case of *Thompson* v. *Drysdale* (3), the Lord President, Lord Clyde, after stating the facts, said : " . . . . in any case in which the shareholders who hold a preponderating interest in a company make it manifest that they intend to set at naught the security provided by company procedure, and to treat the company and its affairs as if they were their own property, it is impossible that the minority should retain any confidence in the impartiality or probity of the company's administration, and—according to the circumstances of each particular case—it becomes a question whether the minority are not entitled, as a matter of 'justice and equity' within the meaning of sub-section (vi.) of section 129 of the Companies (Consolidation) Act, 1908, to have the company wound up." That provision is exactly the same as the provision in s. 168 of the Companies Act, 1929. That case is not binding on this Court, but it is a case in which very learned judges applied *In re Yenidje Tobacco Co.* (1)

In the present case, the respondent claims to have the sole management of the company, and to receive as salary 720*l.*, and totally to exclude the petitioner, who is in substance his partner. It is therefore just and equitable that the company should be wound up.

Hon. Denys B. Buckley for the respondent and the company. Strictly speaking, if the respondent has one more vote than all the rest of the shareholders in the company, there cannot be a deadlock.

[CROSSMAN J. I do not propose to decide this case on the question of deadlock.]

In re Yenidje Tobacco Co.(1) is completely distinguished from the present case. In that case, under the constitution of the company the two shareholders and directors had equal voting powers : under a provision in the articles, a

(1) [1916] 2 Ch. 426.
(2) [1924] A. C. 783.
(3) 1925 S. C. 311, 315.

dispute had been referred to arbitration, and after the award had been made the parties acted in such a way that it was impossible to carry it into effect. There was thus a complete deadlock, and the case is purely and simply a case of deadlock. It cannot be relied upon as authority binding on the Court where there is by the company's constitution a majority of voting rights and some person (here the chairman of the board of directors) is entitled in general meeting and at board meetings to a casting vote.

There have been irregularities, and it must be admitted that the elections of the respondent's brother and of Mr. Cary as directors were, technically, not carried out in the proper way. In a case of this kind, however, those irregularities are no ground for a winding-up. If the resolutions were bad and the elections void, the petitioner can have both gentlemen restrained from acting as directors. As to the notice given of the meetings, it is unnecessary to give notice of the business to be conducted at a directors' meeting : *La Compagnie de Mayville* v. *Whitley*.(1) As to the appointment of the respondent as managing director, the respondent, being and having always been entitled to a majority vote, could himself have voted in favour of his appointment at a general meeting convened for that purpose, A member of a company is entitled in general meeting to use his voting powers as he thinks fit and, provided he does not do so improperly, for his own benefit. That applies to a chairman's casting vote. The fact that something was irregularly done at a board meeting which could have been done quite regularly in general meeting is no indication of bad faith. In *In re Furriers' Alliance, Ld.* (2) the shares were substantially held by the two gentlemen who had quarrelled, but there were other shareholders holding five shares. It was held that the fact that the directors had come to loggerheads to such an extent that they could not carry on the business of the company was not a ground for winding-up the company, because by referring the matter to a general meeting it was possible to secure the appointment of further directors. That authority

(1) [1896] 1 Ch. 788.

(2) (1906) 51 Sol. Jo. 172.

applies exactly to the present case. *Loch* v. *John Blackwood, Ld.* (1) was a case in which the majority were so exercising their rights as to prevent the minority from obtaining information about the affairs of the company. That is very different from a case where, as here, one director exercises his voting rights in a manner which he thinks, and another director does not think, to be in the company's best interests. A difference of opinion as to the best method of carrying on the company's business is not enough to show that the lack of confidence is justifiable. The petitioner in the present case must show that the respondent has done something improper, irregular, and dishonest. In the circumstances the Court ought not to accede to this petition and no order ought to be made.

A. F. Topham K.C. in reply. In *In re Furriers' Alliance, Ld.* (2) Warrington J. (as he then was) found that there was no deadlock and dismissed the petition. With regard to *La Compagnie de Mayville* v. *Whitley* (3) it is not suggested on the petitioner's behalf in the present case that it is always necessary that on the calling of a meeting of directors an agenda paper should be sent out saying what is going to be done. In the present case the gist of the objection is that there was sent to the petitioner an agenda which said that certain things were going to be done and which purposely omitted the fact that the respondent was going to propose the election of another director. When an agenda paper is sent out stating that certain things are going to be done, it is to be inferred that nothing in addition to those things is going to be done. Even if that is not so, the course taken in the present case was not straightforward or honest. The respondent's only object was to bring about the appointment of two directors for the purpose of procuring the appointment of himself as managing director. He could not have voted for himself at a board meeting and in fact, he did not vote. Nor could he have used his casting vote at a general meeting for this purpose. What he has is the casting vote

(1) [1924] A. C. 783.
(2) (1907) 51 Sol. Jo. 172.
(3) [1896] 1 Ch. 788.

given to him by the articles as chairman of the board of directors. The chairman of the board of directors presides, and is therefore voting as chairman of the board of directors. Under the articles, he takes the chair at a general meeting of the company in his capacity as chairman of the board of directors. Therefore he is just as much in a fiduciary position at a general meeting of the company as he is at a meeting of the board of directors, so that his purported procuring of his appointment as sole managing director cannot have been effective.

CROSSMAN J. [after stating the facts:] It seems to me that, in deciding whether it is just and equitable that the company should be wound up, I am left really to consider in the widest possible terms what justice and equity require: and it is with due regard to that consideration that I must form an opinion of what was being and what is being done.

I find that the company is a private company in the fullest possible sense, and that the petitioner and the respondent hold the capital of the company substantially in equal shares. On the authorities, and particularly *In re Yenidje Tobacco Co.* (1) I am bound now to consider the position in the same way as I should consider it if the question arose as to the right of one of two partners in a private partnership to have the partnership dissolved. The same circumstances which entitle a partner to require the dissolution of a partnership entitle a person who is equally interested with one other person in a company to have that company wound-up on the ground that the circumstances render it just and equitable. That, I think, is the effect of *In re Yenidje Tobacco Co.* (1), and I think that the principles apply here. I take that case, not because the facts in it exactly agree with those in this case, but because of the principles there laid down, where the statement of the law in Lindley on Partnership is applied to a company.

I have now to try to find the real position as between these parties.

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(1) [1916] 2 Ch. 426.

Counsel for the respondent, who has argued this case with great force and has admirably put every point which he could possibly have put on the respondent's behalf, suggests to me that there is nothing wrong here in any way, and that I ought to leave the petitioner here in the position in which he now is, turned out, as I think, substantially from anything to do with the management of the company and prevented really from taking part in it, and that he has no remedy at all in this matter. I should greatly regret to have to find that the position in law was that a person could be treated as the petitioner has here been treated and should have no remedy at all. I have come to the conclusion in this case that, in effect, the object of the meetings on April 16 and April 18, 1935, was to get sufficient power into the respondent's hands to enable the respondent to get himself appointed managing director and thereby obtain complete control of the company. If that was so, I think it may be that that was not effectual, because of the present view which I take of the case. The appointment of these two directors was not valid, they being persons not qualified. He then proceeds to get himself appointed managing director. What weighs with me very much is that I find the next step he takes is to eject the petitioner from his room, treating him as a person who was to have no further part in the management of the company, though he was in fact a director. Looking at the matter all round and considering the evidence as a whole, I cannot help coming to the conclusion that this is a case where it is just and equitable that the company should be wound up.

I do not think it is necessary for me to go into the details of the evidence here or to try to sum up the evidence; but I find that this is a case where, if it was a case between partners, I should be bound to come to the conclusion that there ought to a dissolution of the partnership.

In those circumstances I think I must come to the conclusion that a winding-up order ought to be made. The parties are not prepared to come to some arrangement between themselves by which they can prevent the company from being wound up, although by not being so prepared they are only damaging themselves. In the absence of some arrangement of that sort, I must make an order in the usual form for the winding-up of the company.

Solicitors: *Turner, Osborn & Chatterton; John B. Purchase & Clark.*

K. R. A. H.

JENNINGS *v.* STEPHENS.

CROSSMAN J.
1935
May 31; *June* 8, 20, 21; *July* 3, 4, 5, 17.

[1934. J. 1427.]

Copyright—Dramatic work—Performance at a Women's Institute—"In public"—No infringement—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 2; *s.* 2, *sub-s.* 1.

By s. 1, sub-s. 1, of the Copyright Act, 1911: ". . . . copyright shall subsist . . . . in every original . . . . dramatic . . . . . work. . . . ."

By sub-s. 2: ". . . . 'copyright' means the sole right to produce . . . . the work . . . . in public; . . . ."

By s. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: . . . ."

A copyright play was performed by members of a dramatic society, at a monthly meeting of a village Women's Institute, without the author's consent. Members of the Institute were usually allowed to bring guests to the monthly meetings, but at the meeting at which the play was performed the only guests whose presence was allowed were the performers. In the village, the female population numbered 1,084: of these, 109 were members of the Institute, and at the performance 62 members were present:—

Held, that the case had to be decided by reference to its own circumstances, and that the performance was not a performance "in public" within the meaning of the Act, and therefore did not infringe the copyright.

Dictum of Bowen L.J. in *Duck* v. *Bates* (1884) 13 Q. B. D. 843, 850, applied.

Harms (Incorporated), Ld. and Chappell & Co. v. *Martans Club, Ld.* [1926] Ch. 870: [1927] 1 Ch. 526, considered and distinguished.

WITNESS ACTION.

This action raised the question whether a performance, at a meeting of a Women's Institute at which no guests were present, of a dramatic work without the consent of the owner of the copyright in that work, was a performance " in public " within the meaning of the Copyright Act, 1911, and therefore infringed the copyright.

The plaintiff was the author of, and owner of the copyright in, a play entitled "The Rest Cure." The defendant, who was president of a dramatic society, caused or authorized a performance of the play by members of the dramatic society, without the plaintiff's consent, at a monthly meeting of the Duston Women's Institute. At that meeting the only guests present were those members of the dramatic society who performed the play, but, in the ordinary course, members of the Institute were allowed to bring guests to the Institute's monthly meetings. The female population of Duston was 1,084: 109 of these were members of the Institute, and only 62 members were present at the performance.

In this action the plaintiff claimed against the defendant a declaration that the performance was a performance in public and constituted an infringement of the plaintiff's copyright in the play. The defendant denied that the performance was a performance in public.

The facts are fully stated in his Lordship's considered judgment.

F. P. M. Schiller K.C. and *E. J. Macgillivray* for the plaintiff. The case raises a short point of great importance, and is in the nature of a test case. The question for decision is whether the performance of which the plaintiff complains was a performance given " in public." If it was, there has admittedly been an infringement of copyright.

The Women's Institutes have come into existence since the war. The movement has grown from small beginnings. In 1915 there were just a few Institutes: now there are over 5000. The movement is one of great importance and in its nature it is essentially a public movement. It is based upon the principle that in each little village centre there are what may be called "cells" from which these Women's Institutes are formed. Above these "cells" comes a central body, for the conduct of the Institutes, called a County Federation: and above the County Federation is the National Federation. All these bodies are affiliated with one another and are in close touch with one another.

It is necessary to consider who could have come to the performance. It is possible to hold what may essentially be called a public meeting from which the general public is excluded. In every case the Court must decide whether the institution which it is considering—in the present case the Women's Institutes—purports to be a private domestic affair or a public institution. The Women's Institutes do the latter, and it follows that whatever particular thing the Duston Women's Institute may do on any particular occasion will not prevent this particular performance from being a performance "in public." On the other hand, a club which is entirely private may, if its rules make possible the constant invitation of guests, and if it is a very large club, become a public concern by virtue of the way in which it carries on its work for the purposes of the dramatic art, in spite of its being prima facie a private concern: *Harms (Incorporated) and Chappell & Co.* v. *Martans Club.* (1) In the present case, no guests were present at the performance of "The Rest Cure." In a sense a performance is domestic where, to quote the example given by Fry L.J. in *Duck* v. *Bates* (2) ". . . . a nobleman possessed of a large mansion in the country, having his house full of distinguished guests, invites them, his servants, and such of the residents in the county as are in the habit of visiting him, to witness the representation of a dramatic piece; . . . ." Even in *Duck* v. *Bates* (2) the judgment of the majority of the Court was given with considerable doubt: and there the performance was given merely for the amusement of the patients in and staff of a hospital. The mere fact that only members of the Duston Women's Institute were admitted on the occasion which the Court is now considering does not alter the public character of the Women's Institutes' activities. Such a body as the Women's Institutes cannot, when performing a play, give a private performance. All their performances, because of the nature of the objects which they advertise all over the world, show that what they are doing is not private but public.

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(1) [1926] Ch. 870; [1927] 1 Ch. 526.

(2) 13 Q. B. D. 843, 853, 854.

In the Introduction to the Handbook of the National Federation of Women's Institutes for 1932–1933 it is stated that " Women's Institutes are gatherings of country women who meet together at least once a month to discuss matters of interest to them all." The organization is a most amazing one, and is as free from the taint of private enterprise as anything can possibly be. It has " public life " written all over it. It must be kept together in the national interest and if, as part of that national and public purpose, it is found advisable to give dramatic entertainments to the members who band together for that national purpose, every one of those dramatic entertainments is a public performance. The activities of the Women's Institutes are far wider than those of a club or of a gentleman entertaining guests in his own house. The annual subscription to be paid by each member of a Women's Institute is *2s.*

The first authority on the matter is *Duck* v. *Bates* (1), a decision under the Dramatic Copyright Act, 1833, but nevertheless still treated by the Courts as authoritative. The decisions under the Copyright Act, 1911, have gone back to that case. Sect. 1 of the Dramatic Copyright Act, 1833, provided that " . . . . the author of any . . . . play . . . . shall have . . . . the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever . . . . any such production as aforesaid. . . . ." In *Duck* v. *Bates* (1) a performance was given for the nurses and staff at Guy's Hospital at which a number of people were present, and an action was brought for infringement. Brett M.R. (as he then was) and Bowen L.J. (as he then was)

(1) 13 Q. B. D. 843.

CROSSMAN J.

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held that the place where the performance was given was not a place of public entertainment, and that therefore the defendant was not liable under the Dramatic Copyright Act, 1833. Fry L.J. delivered a dissenting judgment. All the decisions seem to have gone on the assumption that a dramatic performance, to infringe copyright, must be in a place of public entertainment. In *Duck* v. *Bates* (1) Brett M.R. (as he then was) indicated that there are two tests whereby to ascertain whether a dramatic performance infringes copyright: the first test is that of domesticity and privacy, the second that of injury to the author. If domesticity and privacy are absent, or if the performance is likely to diminish the number of persons who would go to see a performance authorized by the author, the copyright is infringed. If the performance is given in a place which is not ordinarily a place of dramatic entertainment, and if the performance is likely to lead to injury to the author because it deprives him of a certain potential audience, that must be taken into consideration, and may be conclusive on the question whether the place of performance is a place of dramatic entertainment. That is the view which the Court has taken. Fry L.J., who delivered a dissenting judgment in *Duck* v. *Bates* (1), was perhaps the sternest of all logicians who were on the bench at that time, and his dissenting judgment is of value in so far as he affirms the view that injury to the author is one of the key-notes. It is true that he does not say that a performance, although domestic and private, may infringe copyright, but he gives a very illuminating illustration of what he thinks are not domestic and private performances.

In *Harms (Incorporated) and Chappell & Co.* v. *Martans Club* (2), a musical number from a copyright play was performed by the orchestra of a club under the rules of which there was no fixed limit to the number of guests whom members might introduce, before an audience of 180, of whom fifty were guests. The Court of Appeal affirmed the decision of Eve J. and held that on the facts the performance was a performance

(1) 13 Q. B. D. 843.

(2) [1926] Ch. 870; [1927] 1 Ch. 526.

"in public" within the meaning of the Act. In *Performing Right Society* v. *Hawthorns Hotel* (*Bournemouth*) (1) Bennett J. held that an orchestral performance in a hotel was a performance "in public" within the meaning of the Copyright Act, 1911. In *Messager* v. *British Broadcasting Co.* (2) McCardie J. expressed the view that the defendants in broadcasting an opera gave a public performance: and earlier in his judgment he said (3): "A purely domestic or private performance will not, as a rule, amount to an infringement of copyright: *Duck* v. *Bates*. (4) On the other hand, a performance given in a dancing or social club may upon the facts be 'public' within the Copyright Act, 1911, although no charge for admission be made. It must be remembered that members together with their guests may constitute a body of persons who would otherwise pay to hear a performance of the piece at a theatre, concert hall, or the like place of entertainment: see *Harms* (*Incorporated*) *and Chappell & Co.* v. *Martans Club*. (5) To hold otherwise would deprive an author or composer of the protection that he may justly claim." In *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (6) it was held that the defendants, by rendering songs broadcast by the British Broadcasting Corporation audible to visitors to a hotel belonging to the defendants by means of a receiving set and loud-speaker, had given or authorized a "performance" within s. 35, sub-s. 1, of the Copyright Act, 1911. It was admitted that if what the defendants had done amounted to a performance, it was a performance "in public." It had been given without the plaintiffs' consent, and it was held to constitute an infringement of the plaintiffs' copyright. That decision makes it clear that, for example, merely performing to the villagers in the village hall constitutes a public performance.

The meaning of the phrase "in public" is made clear by all these authorities. The phrase is applicable to everything that is not domestic or private. For the reasons which have

(1) [1933] Ch. 855.

(2) [1927] 2 K. B. 543, 548.

(3) Ibid. 547.

(4) 13 Q. B. D. 843.

(5) [1926] Ch. 870; [1927] 1 Ch. 526.

(6) [1934] Ch. 121.

been given, the Women's Institutes constitute, not a domestic or private body but, whether an Institute be in a village or in the country, a purely public body which any female can join upon paying a subscription.

J. M. Gover K.C. and *J. V. Nesbitt* for the defendant. The authorities show that the question for decision—namely, whether at a particular meeting on a particular occasion there was a performance "in public"—which depends wholly on the circumstances of each case. The case is in no sense a test case, for the Court is not being asked to lay down some new general principle of law which would apply to all cases of meetings of Women's Institutes.

In this case, the absence of guests is absolutely conclusive on the question. In *Duck* v. *Bates* (1) the Court held, despite the presence of guests, that the performance was not a public performance. The contention that no performance by any Women's Institute can be a private performance is fallacious, for it assumes, first, that because a movement has repercussions of national interest and importance it is therefore a public movement, and secondly that, that being so, a gathering of any members or any body of persons interested in that movement must be a public gathering. All persons are members of the public, in their families: at breakfast time, for example, they are members of the public, and it is in the interests of the nation in general that the members of the public should eat breakfast or eat a meal at some time; but that does not make breakfast a public function. Political clubs have the merit that they consist of persons who are interesting themselves in the national welfare, and, in that sense, of course, the political club movement is a national movement. But the suggestion that the fact that local are affiliated to County and County to National political associations makes it impossible to have private or non-public meetings of local political associations is not well founded. It would follow from that that the singing of a song by a member of a local political association at an annual dinner of that association at which no guests were present would

(1) 13 Q. B. D. 843.

constitute a public performance. Similar illustrations are applicable to, e.g., the British Legion, the Boy Scout and Girl Guide movements, literary societies and athletic or cricket clubs. As to the presence of guests, *Duck* v. *Bates* (1) shows that the presence of a limited number of guests would not make any difference. It may fairly be said that the Courts have laid down, that, as to performance "in public," the primary question is whether the performance is what Bowen L.J. (as he then was) called in *Duck* v. *Bates* (2) "domestic or quasi-domestic," or what Sargant L.J. in *Harms (Incorporated) and Chappell & Co.* v. *Martans Club* (3) called an "enlarged family or domestic performance." The authorities show also that in particular cases there are certain special elements which have to be taken into consideration, e.g., the number of persons entitled to be present, the question whether any profit is made (which may involve the questions whether any payment is made to go in, or any payment made to the performers), and the question whether any outside members of the public are present at what might otherwise be a purely domestic or quasi-domestic gathering and, if so, in what numbers. In the present case the performance was given at a monthly meeting of the members of a small local society or club which was purely private in the ordinary sense of the word. The performance was by amateurs, without any profit and without any payment to them : and there was no payment by the audience. It cannot be suggested that the subscription of 2*s*. was a payment for hearing a public performance. In *Harms (Incorporated) and Chappell & Co.* v. *Martans Club* (4) the members of a so-called club called the Embassy Club paid an annual subscription to a person who was running the whole thing on a commercial basis, and all the profits made went to the proprietor of the club.

A performance to an audience or gathering which was purely domestic or quasi-domestic in character, or an enlarged domestic audience, could never be in public. It is impossible, again, to conceive of anything more private than a Masonic dinner: yet, if the argument for the plaintiff is right, the singing of a song at a Masonic dinner is a performance in public.

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(1) 13 Q. B. D. 843.
(2) Ibid. 843, 850.
(3) [1927] 1 Ch. 526, 536.
(4) [1926] Ch. 870 ; [1927] 1 Ch. 526.

The basis of the Women's Institute movement is the village—the Institute itself. A Women's Institute is purely a local village association. There may be 5000 or there may be 50,000 of them, but they are each entirely separate village clubs or societies. The history of the matter is that by their own volition they decided to affiliate themselves to the County organizations and they adopted the rules of the National Federation. The National Federation came into being when there were already 137 Institutes in existence, and that was at the volition of the Institutes themselves. The Institute movement as a whole is a number of private associations or clubs which have for their own convenience federated themselves for certain purposes.

In *Harms (Incorporated) and Chappell & Co.* v. *Martans Club* (1) the Court took the view which it took, first, because the Embassy Club was not a club at all in the real sense, but was a number of persons who made payments annually to a company in consideration of being provided with a place in which to eat, drink, and dance, and secondly, because the number of people entitled to attend was as much as 1800, and fifty outside members of the public were, and 500 or more might well have been, admitted. According to the rules, each member of the club could bring five guests. The payments made by the members of the Embassy Club have no bearing on the payment of 2*s.* a year made by the members of a Women's Institute. In *Messager* v. *British Broadcasting Co.* (2) it was perfectly hopeless to argue that the broadcasting of the copyright opera did not constitute a performance in public. *Performing Right Society* v. *Hawthorns Hotel (Bournemouth)* (3) was entirely different from the present case. [They referred also to *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (4); *Gramophone Co.* v. *Stephen*

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(1) [1926] Ch. 870: [1927] 1 Ch. 526.

(2) [1927] 2 K. B. 543.

(3) [1933] Ch. 855.

(4) [1934] Ch. 121.

Cawardine & Co. (1); *Hawkes & Son* (*London*), *Ld.* v. *Paramount Film Service, Ld.* (2)].

All the authorities clearly support the view that the performance in the present case could not possibly be said under any circumstances to be otherwise than a non-public performance.

F. P. M. Schiller K.C. and *E. J. Macgillivray* in reply. The Women's Institute is recruited from everybody in the village. The village Institute is the microcosm, the National Federation the macrocosm. In such a case the words "domestic and private" are inapt.

Cur. adv. vult.

1935. July 17. CROSSMAN J. In this case the plaintiff claims, first, a declaration that the performance of the play entitled "The Rest Cure" by the Overstone and Sywell Dramatic Society at the monthly meeting of the Duston Women's Institute on February 23, 1933, was a performance in public and constituted an infringement of the plaintiff's copyright in the said play, and, secondly, damages for infringement of copyright.

The plaintiff is the author of and is and was, at all material times, the owner of the copyright in a dramatic work, that is to say, a stage play in one act, first produced on March 16, 1914, at the Vaudeville Theatre, London, under the title of "The Rest Cure." Under s. 1, sub-s. 2, of the Copyright Act, 1911, "Copyright" means the sole right, among other things, to perform a dramatic work in public, and under s. 2, sub-s. 1, of the same Act, "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything, the sole right to do which is by this Act conferred on the owner of the copyright: . . . ."

The defendant is the president of the Overstone and Sywell Dramatic Society, and on February 23, 1933, at a monthly meeting of the Duston Women's Institute held in the village hall at Duston, she caused, or authorized, a performance by

(1) [1934] Ch. 450.

(2) [1934] Ch. 593.

five members of the Overstone and Sywell Dramatic Society, of the play "The Rest Cure," without the consent of the plaintiff. The question in this action is whether that performance was a performance "in public" within the meaning of the Copyright Act, 1911.

It appears from the authorities by which I am bound that this question is largely, if not entirely, a question of fact, and to be determined on the circumstances of the case. The onus is on the plaintiff to establish that the performance was a performance "in public" within the meaning of the Copyright Act, 1911.

The Duston Women's Institute was formed under the rules laid down for Women's Institutes by the National Federation of Women's Institutes. It is stated on page 25 of a book entitled "Handbook of the National Federation of Women's Institutes, 13th Edition, June 1932," among other things, that a Women's Institute is a voluntary association of country women, formed to improve the conditions of rural life, and to provide opportunities for mutual help and intercourse, and that the general rule of the National Federation is to sanction the formation of Institutes only in rural communities consisting of not more than 4000 inhabitants, and that, at the first meeting, all present may join, and that, later, names of intending members must be proposed and seconded for election, either at the committee or at the monthly meeting. Para. V. of the Women's Institute constitution and rules, as set out in the same handbook, provides that the annual subscription shall be 2*s.*, and shall be paid by each member on joining the Institute, and in the first month of each Institute year thereafter. Para. VIII. provides that monthly meetings of an educational or social nature shall be held on a regular day and at an hour and place decided upon by the members. It is stated on page 39 of the same handbook that the programmes for monthly meetings should reflect the wishes of the members both as regards the time fixed for the meeting and also in the educational and social items, and that it is usual for the programmes to be drawn up for six months or a year in advance, and that the programmes must be practical, seasonable, and so full of variety as to appeal to all tastes during the year. Para. IX. of the constitution and rules provides that on signing the rules the Institute shall be affiliated to the National Federation of Women's Institutes, and to the County Federation of the county where the Institute is situated. It is stated on page 8 of the handbook that by May, 1933, there were 4878 Institutes (Women's Institutes that means) in existence. The Duston Women's Institute has 109 members, the total female population of the village being 1084. At the monthly meeting on February 23, 1933, at which the performance in question took place, sixty-two members of the Duston Women's Institute were present. No guests were present at that meeting except the five members of the Overstone and Sywell Dramatic Society who performed the play, it having been made a condition of the performers giving the performance that no one other than the members of the Duston Women's Institute and the performers should be present. In the ordinary course, members are allowed to bring guests to the monthly meetings. The majority of the members of the Duston Women's Institute are persons of small means.

In considering whether the performance in question was "in public" within the meaning of the Copyright Act, 1911, I have to bear in mind two authorities: the first is *Duck* v. *Bates* (1) and the second is *Harms (Incorporated) and Chappell & Co.* v. *Martans Club.* (2) *Duck* v. *Bates* (1) was a decision on the Dramatic Copyright Act, 1833 (commonly known as Bulwer Lytton's Act), which enacted that the author of a dramatic piece of entertainment should have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever, any such production as therein mentioned. The Court of Appeal by a majority (Fry L.J. dissenting) in effect held that, in order to constitute a performance "a representation at a place of dramatic entertainment" within the meaning of the Dramatic Copyright Act, 1833, publicity was necessary, and that a performance by an amateur dramatic club at Guy's

(1) 13 Q. B. D. 843.

(2) [1926] Ch. 870; [1927] 1 Ch. 526.

Hospital of the play " Our Boys " for the entertainment of the nurses, attendants and others connected with the hospital, had not the element of publicity which was necessary to constitute it a representation at a place of dramatic entertainment within the meaning of that Act. In *Harms (Incorporated) and Chappell & Co.* v. *Martans Club* (1) Eve J., relying on the judgments of Brett M.R. (as he then was) and Bowen L.J. (as he then was) in *Duck* v. *Bates* (2), held that a performance of a musical number at a club for dining and dancing owned by a limited company on an occasion when 130 members of the club, who paid an entrance fee and an annual subscription, and fifty guests were present, was a performance " in public " within the meaning of the Copyright Act, 1911 ; and the Court of Appeal unanimously affirmed this decision, holding that the learned judge had taken the right facts into consideration in arriving at his conclusion. Having regard to these authorities, I am of opinion that what I have to consider in the present case is whether there was any admission of any portion of the public to the performance of " The Rest Cure " in question, or whether the performance was private ; how many people were present at the performance ; what kind of place the performance was in ; whether the performance was for profit, and whether the performance would attract members of the public who would be willing to pay money to see a performance licensed by the author, and would induce them not to go to see it.

The case was very fully and ably argued before me. The substance of the argument on behalf of the plaintiff was that the Duston Women's Institute is not a private club but a branch of a public institution formed for the purpose of improving the conditions of rural life for women, and that as such it cannot give a dramatic performance which is not a performance in public. The argument on behalf of the defendant was that the Duston Women's Institute is a small local society or club in fact federated with other clubs, the *raison d'être* of all the federated clubs being the public purpose of improving the conditions of rural life for women. I find

(1) [1926] Ch. 870; [1927] 1 Ch. 526.

(2) 13 Q. B. D. 843.

that the Duston Women's Institute is in fact a separate institution and is a small local society or club. Any female inhabitant of the village of Duston who was present at the meeting at which the Duston Women's Institute was originally formed could then have become a member, but now a woman cannot become a member without being elected either by the existing members or by the committee. There are at present about 1080 female inhabitants of the village of Duston, including children. There are, as already mentioned, 109 members of the Duston Women's Institute. The performance in question took place at a regular monthly meeting of the Duston Women's Institute at which sixty-two members were present, and at that meeting no other person (except the performers) was present or could have been present, the performance having been given on condition that no non-member was allowed to be present. The performance was given by amateurs who received no payment, and the members of the Duston Women's Institute paid nothing for the performance except so far as their annual subscription of 2*s*. can be said to be a payment. The performance took place in the Duston village hall, which was hired by the Duston Women's Institute for the purpose of its monthly meeting.

It was suggested before me that this is a test case, but I am not satisfied that this can be so. In my judgment, each case must depend upon its own circumstances, and I have to consider the present case entirely in view of the circumstances of the performance in question. I have considered all the circumstances, and I have had regard to the matters which I have mentioned, as being, on the authorities, material, and I have come to the conclusion that this particular performance was not a performance " in public," within the meaning of the Copyright Act, 1911. Finding, as I do, that the Duston Women's Institute is a private society or club federated with other societies or clubs, and treating the dictum of Bowen L.J. (as he then was) in *Duck* v. *Bates* (1) as applicable to the question under the Copyright Act, 1911, I cannot accept the plaintiff's contention that the nature of a Women's Institute is such that no performance at a meeting of a Women's Institute can fail to be public. I have had regard to the facts that the membership of the Duston Women's Institute is limited to such of the 1084 female inhabitants of the village of Duston as are elected by the existing members, that the membership is very little over 100, that the performance took place in a hall hired by the members for the purpose of its meeting, that the performance was part of the ordinary social amenities of the regular monthly meeting of the Duston Women's Institute, that no one, except members and the performers, was present or could have been present at the meeting at which the performance took place, and that only sixty-two members were present. It may be that some or all of the sixty-two members would have been willing to pay money to see a performance of "The Rest Cure," but in my opinion this fact, if it be a fact, is not enough by itself to constitute the performance a performance "in public" within the meaning of the Copyright Act, 1911.

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(1) 13 Q. B. D. 843, 850.

I regard the fact that only members were admitted to the meeting and that guests were specially excluded as a consideration of importance. Considering all the circumstances, I find that there was not any admission of any portion of the public to the performance, and that the performance was a quasi-domestic and not a public affair. In my judgment, the circumstances of the present case are different from those in the case of *Harms (Incorporated) and Chappell & Co.* v. *Marians Club* (1), where, first, the defendants were the proprietors of the club in question; secondly, there were 1800 members of the club; thirdly, there were 150 members of the club and fifty guests present at the performance; and fourthly, the members paid the defendants for the performance by a substantial fee and annual subscription, and a payment for each guest.

On the whole, I hold that the plaintiff's case fails, and that the action must be dismissed.

Solicitors: *Reynolds, Sons & Gorst; Francis & Crookenden.*

K. R. A. H.

(1) [1926] Ch. 870; [1927] 1 Ch. 526.

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1935

July 9, 23, 31.

BERRY AND STEWART *v.* TOTTENHAM HOTSPUR FOOTBALL AND ATHLETIC COMPANY, LIMITED.

[1935. B. 1523.]

Practice—Interrogatories—Company—Refusal to register Transfer of Share—Power under Articles so to refuse—Interrogatories directed to refusal—" Specifying Grounds "—" Assigning Reasons."

Article 16 of the company's articles of association provided: " The directors may decline to register any transfer of shares made by a member who is indebted to the company or in case the transferee shall be a person of whom the directors do not approve or shall be considered by them objectionable, or the transfer shall be considered as having been made for purposes not conducive to the interests of the company, and the directors shall not be bound to specify the grounds upon which the registration of any transfer is declined under this article, ..."

The company refused to register the transfer by the plaintiff B. to the plaintiff S. of a share in the company's capital of which B. was the registered holder. By this action the plaintiffs claimed (inter alia) a declaration that the company was not entitled to decline to register the transfer, and an order that the register of members of the company should be rectified by the deletion of B.'s name as holder of the share and by the insertion in lieu thereof of S.'s name. The plaintiffs sought to administer to the company the following among other interrogatories :—

2. Did the directors refuse to register the said transfer as one made by a member indebted to the company ?

3. Did the directors in fact disapprove of the plaintiff S. as a transferee of the said share ?

4. Did the directors in fact consider the plaintiff S. objectionable as a transferee of the said share ?

5. Did the directors in fact consider the transfer of the said share as having been made for purposes not conducive to the interests of the company ?

The Master refused leave to administer these interrogatories. On this summons by the plaintiffs claiming to be entitled to administer them, it was contended for the plaintiffs that the word " grounds " in the clause " and shall not be bound to specify the grounds " in Article 16 had the same meaning as the word " reason " in the phrase " without assigning any reason " in an article which was considered by the Court in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corporation, Ld.* [1926] Ch. 746, in which the interrogatories which it was sought to administer were allowed as being directed to eliciting under which branch of the power given by the article the directors had acted. For the company it was contended that the two words had not the same meaning:—

Held, that, on the true construction of Article 16 "specifying grounds" was not the same thing as "assigning reasons," and that the interrogatories were not proper to be allowed.

Sutherland (*Duke*) v. *British Dominions Land Settlement Corporation, Ld.* [1926] Ch. 746, considered and distinguished.

PROCEDURE SUMMONS.

This summons was taken out by Hubert Berry and James Arthur Stewart (hereinafter together called "the plaintiffs") in an action by them against Tottenham Hotspur Football and Athletic Company, Ld. (hereinafter called "the company"). The Master had refused leave to the plaintiffs to administer certain interrogatories to the company, and by this summons the plaintiffs claimed to be entitled to administer them.

The company was incorporated on May 7, 1898. On or about March 22, 1935, the plaintiff Berry, who was then the registered holder of (inter alia) one ordinary share of 1*l.*, numbered 544, in the company's capital, transferred that share to the plaintiff Stewart, and by letters dated March 23, 1935, the plaintiffs asked the company to register the transfer. By letters dated April 3, 1935, the company refused to register the transfer, and by the writ in the action, issued on April 24, 1935, the plaintiffs claimed (inter alia) a declaration that the company was not entitled to decline to register the transfer, and an order that the register of members of the company should be rectified by the deletion of the plaintiff Berry's name as holder of the share and by the insertion in lieu thereof of the plaintiff Stewart's name.

The plaintiffs sought to administer to the company the following among other interrogatories:—

2. Did the directors refuse to register the said transfer as one made by a member indebted to the company?

3. Did the directors in fact disapprove of the plaintiff Stewart as a transferee of the said share?

4. Did the directors in fact consider the plaintiff Stewart objectionable as a transferee of the said share?

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5. Did the directors in fact consider the transfer of the said share as having been made for purposes not conducive to the interests of the company ?

The Master, on the matter coming before him, refused leave to administer these interrogatories, and by this summons the plaintiffs claimed to be entitled to administer them.

R. E. Manningham-Buller for the plaintiffs. The action is brought in order to test the legality of the company's refusal to register the transfer. The defence is that the directors have complied with Article 16 of the company's articles of association. It is in connection with the words " . . . . and the directors shall not be bound to specify the grounds upon which the registration of any transfer is declined under this article . . . ." in Article 16 that the plaintiffs seek to administer these interrogatories, and they are directed to ascertaining under which branch of the particular power given by that article the directors have purported to act. The interrogatories are in fact modelled on those allowed by Tomlin J. (as he then was) in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corporation.* (1) The relevant article in that case was : " The directors may without assigning any reason, decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted or under any liability to the company." There is no material difference between that article and the one which the Court is here considering. They have the same meaning —namely, that the directors are not bound to specify why they have acted, but are bound to say under which branch of the power they have purported to act. To do that would not be to give a reason. No onus lies upon the directors of a company to give their reasons for refusing to register a transfer, though, if they do give their reasons, the merits of them can be considered: *In re Gresham Life Assurance Society. Ex parte Penny.* (2) In *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corporation* (3) Tomlin J. (as he then was) expressed

(1) [1926] Ch. 746.
(2) (1872) L. R. 8 Ch. 446.
(3) [1926] Ch. 746, 755, 756.

the view that the question what branch of the power the company alleged they had acted under was a matter in regard to which the plaintiff was fairly entitled, upon the issues raised upon the pleadings, to interrogate the defendants. It is true that he also said: " . . . . it seems to me that the reason for exercising the power is a distinct thing from the grounds which give rise to its exercise." In saying that, however, he was clearly trying to give an illustration and was not laying down a general principle. What he said was simply by way of illustration, and was not intended by him to be followed as a binding interpretation of the words " reason " and " grounds." If the plaintiffs are not here entitled to obtain some indication of the branch of the power under which the company purports to have acted, they will be in the greatest difficulty, for in actions of this kind the onus of proving wrongful action by the directors of a defendant company is always upon the plaintiff. No defendant to an action in the High Court is entitled to come to trial without disclosing his line of action. The distinction between " grounds " and " reasons " does exist in some cases, but does not in the present case. In construing such an article as Article 16, the Court will give it its ordinary interpretation, remembering that these articles were drawn up long before any decided case had indicated any difference between " grounds " and " reasons." The relevant definition of " ground " in the Oxford English Dictionary, Vol. IV., Part II, p. 450, II, 5, c., is: " A circumstance on which an opinion, inference, argument, statement, or claim is founded, or which has given rise to an action, procedure, or mental feeling. A reason, motive. Often with additional implication: A valid reason, justifying motive or what is alleged as such." That supports the view that in Article 16 " grounds " means reasons or materials supporting the conclusion to which the directors had come as to why they had acted. The point is an important point of principle, for if it is correct to say, as is said on the company's behalf, that it is possible to put into the articles of a company some provision which can prevent a person who wishes to become a shareholder from obtaining discovery in accordance with the rules of Court, that is making it possible

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for a company's articles to override rules of Court. There are many decisions on the position of directors in actions of this kind. At common law, the plaintiffs would not be entitled to ask the directors for their reasons. All that the Court has to determine in the present case is whether, in view of the decision in *Sutherland (Duke)* v. *British Dominions Land Settlement Corporation* (1), the word "grounds" in an article drawn up in 1898 must have a meaning given to the word "grounds" by Tomlin J. (as he then was) in 1926 in a passage that was not in a material part of the judgment. *In re Gresham Life Assurance Society* (2) is an authority on the word "reason." What the Court must do is not to decide with great precision the exact meaning of a particular word, but determine what it is to which the article is directed. The article must be given the meaning which it had at the date of the company's incorporation.

J. B. Lindon for the company. The article in the present case is different from that which was before the Court in *Sutherland (Duke)* v. *British Dominions Land Settlement Corporation.* (1) In order to succeed on this summons, the company must establish that "grounds" has not the same meaning as "reasons." Under the article in the present case, branches of the power and grounds for refusal may overlap. Thus, the words "made by a member who is indebted to the company" form a branch of the power and also a ground for refusal. In articles of this kind there must be attributed to the words used the meanings which they have in law, and a reference to the Oxford Dictionary will carry it no further. In *In re Gresham Life Assurance Society* (3) James L.J. said: "I cannot conceive that any director would choose to accept office, or exercise the power entrusted to him, if he were liable to be called upon to say what the particular reasons were or the particular motive was which influenced him in coming to the conclusion that any person was not eligible as a shareholder. I think, therefore, that these directors were well advised in not subjecting themselves

(1) [1926] Ch. 746.

(2) L. R. 8 Ch. 446.

(3) Ibid. 446, 450.

to be cross-examined and interrogated as to what particular reasons they might have for personally objecting to this gentleman, ..." In the same case Mellish L.J. said (1): "It appears to me that it is very important that directors should be able to exercise the power"—that is, the power to reject a transferee—"in a perfectly uncontrollable manner for the benefit of the shareholders; but it is impossible that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual." Later in his judgment the learned Lord Justice said: "I am, therefore, of opinion that in order to preserve to the company the right which is given by the articles a shareholder is not to be put upon the register if the board of directors do not assent to him, and it is absolutely necessary that they should not be bound to give their reasons, ..." That observation, in view of what Tomlin J. (as he then was) said in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corporation* (2), applies only to "reasons," but it shows that, whatever the general law may be, it is very important that directors who have accepted office on the footing of certain articles should not be compelled to give the reasons why they have acted, and it follows from what Tomlin J. (as he then was) said, that they cannot be compelled to do so.

[CROSSMAN J. What I must really determine is whether, if the interrogatories are allowed, the company will have to answer them.]

Yes. Before the company was incorporated there were Acts of Parliament which contained the words "specifying the grounds" and that expression was well understood by legal draftsmen. It is perfectly possible to exclude discovery by agreement, and an article of association is nothing but an agreement between the company and its members and between the members inter se. In the article in the present case, the words "specify the grounds" are quite free from ambiguity. Specifying grounds is quite different from giving reasons. The word "specify" is of Latin derivation, and means, make quite clear the species to which reference is made.

(1) L. R. 8 Ch. 446, 451, 452.

(2) [1926] Ch. 746.

In *Sutherland (Duke)* v. *British Dominions Land Settlement Corporation* (1) Tomlin J. (as he then was) said quite clearly that grounds are something other than reasons, and that has been quoted with authority: see Buckley on the Companies Acts, 11th ed., p. 139. Even if the learned judge had been sitting in 1898, when the article in the present case was drawn up, he could have perceived the difference between grounds and reasons quite as clearly as he did in 1926. [He referred to *Jolly* v. *Brown*. (2)] Statutes enacted long before 1898 use the words "specifying the grounds." For example, by s. 18 of the Union Assessment Committee Act, 1862: "Any overseer . . . . of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list . . . . may . . . . give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof, ..." Reference was made to that provision in *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (3) In an interlocutory proceeding where a plaintiff has bound himself not to ask for discovery of a particular kind, there is no right to that discovery: *Turney* v. *Bayley*. (4) [He referred also to *Whiffen* v. *Hartwright*. (5)] If the Court holds that Article 16 means that the directors are not bound to specify under which branch they have acted, the Court should, in the exercise of its discretion, do nothing that would run counter either to that article or to the judgments in *In re Gresham Life Assurance Society* (6), which point out how important it is that a company should have the protection of its articles. The plaintiff Stewart is a non-member of the company seeking to become a member. The foundation of his action in this Court is the transfer of a share, and he is expressly subject to the same conditions as apply to the member who transferred it. Thus he cannot come forward and say that he is in a better position than that member.

(1) [1926] Ch. 746.
(2) [1914] 2 K. B. 109.
(3) [1925] A. C. 309
(4) (1864) 4 De G. J. & S. 332.
(5) (1848) 11 Beav. 111.
(6) L. R. 8 Ch. 446.

For these reasons the Court should refuse to allow the interrogatories to be administered.

R. E. Manningham-Buller in reply. A non-member of a company may clearly have a higher right of discovery against the company than a member has, because he may not have entered into any agreement waiving his right. [He referred to *In re Bede Steam Shipping Co., Ld.* (1)] If the argument for the company is right, directors can refuse to register transfers of shares on whatever ground they choose, without running the slightest risk of investigation by the Court. [He referred to *Jolly* v. *Brown* (2) and *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (3)] The discretion of the Court should be exercised in favour of allowing the interrogatories, and the meaning given to Article 16 should be the meaning which does not encroach upon the right of an individual member of the company.

CROSSMAN J. [after stating the facts :] The first point made for the plaintiffs is that Article 16 of the company's articles of association does not prevent the questions in these interrogatories from being asked. For the purpose of deciding that point it has been agreed between the parties that the question which I shall determine is whether if the interrogatories were allowed (assuming that they are proper to be allowed), the company would be bound to answer them : and I am not to allow the interrogatories if I am of opinion that the company would not be bound to answer them if they were allowed. The question, then, is whether the company would be bound to answer these interrogatories or whether it is excused from answering them by Article 16 of the articles of association. The plaintiffs rely upon a decision of Tomlin J. (as he then was) in *Sutherland (Duke)* v. *British Dominions Land Settlement Corporation* (4), in which the learned judge had to consider somewhat similar circumstances, where the relevant article was : [his Lordship read it and continued :] Tomlin J. held that the plaintiffs were entitled to interrogate the

(1) [1917] 1 Ch. 123.
(2) [1914] 2 K. B. 109.
(3) [1925] A. C. 309.
(4) [1926] Ch. 746, 756.

defendants as to whether the transfer was to a person of whom the directors did not approve, and whether the plaintiff was in fact a person jointly or alone indebted to the company. In the course of his judgment he distinguished between the two points on which inquiry might be made namely, the reasons upon which or for which the directors acted in declining to register, and the grounds of their objection to registration, which he regarded as two distinct things, and he shows clearly that he distinguishes between the reason for exercising the power and the grounds which give rise to its exercise. In the case before him the only thing which the directors were excused from doing was assigning a reason. The directors would never be bound in those circumstances to assign any reason, but the learned judge held that that did not excuse them from specifying under which particular branch of the article excusing them they were acting. He held that it was their duty, as he said, to say under which branch they were acting, and that that would be done by answering the particular interrogatories which were delivered in that case.

In the present case the words in the article are not, as they were in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corporation* (1), " without assigning any reason." They are "shall not be bound to specify the grounds." I cannot, as a matter of construction, come to the conclusion that " specify the grounds " means the same as " assign the reasons," having regard to the statement of Tomlin J. I think they are two quite different things, and that what the directors are excused or saved from doing in the case before me is naming the species of ground under which they have acted ; that is to say, the particular interrogatories which it is sought to administer here ask them to do the very thing which in my judgment, on the construction of this article, it is provided that they are not bound to do. In my view of the construction, that seems to me to dispose of the matter so far as regards Mr. Berry, the plaintiff who is a member of the company; but it is contended by counsel for the plaintiffs in his very able argument that here I must draw a distinction between a plaintiff who is a member of the company and a plaintiff who is not, that Article 16 binds only members of the company, and that a person who is not yet a member of the company can become a member of the company under the articles, but disregard the prohibitions of Article 16. In my judgment that is not the case. In my view Article 16 applies to a person who is applying to be registered, because it specifies the conditions upon which he is to be registered; the directors are to register on those terms, but if the directors decline to register, then he comes in and asks to be registered under the article, and as the articles provide that they are not bound to specify the grounds, it seems, in my judgment, that the directors are just as much entitled to rely upon the article in the case of the plaintiff Stewart as they are in the case of the plaintiff Berry, who is a member.

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(1) [1926] Ch. 746, 756.

That leaves one further point with which I must deal. It is suggested before me that the fact that by agreement—either by the articles or by any other agreement—persons are prevented from making any particular inquiry, does not prevent them, if they bring an action in connection with the matter on that agreement or by virtue of that agreement, from making that inquiry. It has been suggested that interrogatories are a matter arising out of the rules of Court and that the right to administer interrogatories is not affected by an agreement between the parties. I think *Turney* v. *Bayley* (1) is really an authority to the contrary, because I think it shows that the existence of an agreement may be a ground for refusing a certain sort of discovery. I do not see any reason why that should not be applied to interrogatories as it was applied there to the production of a document. It seems to me that when I have a provision that a party shall not be bound to produce a certain document in connection with a particular matter, the mere fact that an action is brought and an application made to deliver interrogatories,

(1) 4 De G. J. & S. 332.

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does not entirely oust that agreement and preclude the person who had the benefit from relying on it.

On the whole, therefore, I am of opinion that the company would not be bound to answer these interrogatories if they were allowed, and accordingly, in view of the agreement between the parties, I do not allow them.

Solicitors: *Margetts, Jenkins & Hornby; Parker, Garrett & Co.*

K. R. A. H.

END OF VOL. AND OF CHANCERY SERIES FOR 1935.

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PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C.2.

THE

LAW REPORTS.

Under the Superintendence and Control of the

ORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

CHANCERY DIVISION.

(Including Bankruptcy Cases.)

1935.—Vol. I. Ch.

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For Mode of Citation, see Beginning of Index.
[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C.1,
AND
Printed by WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C.2.

"THE LAW REPORTS, 1935," for January, consist of—

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King's Bench and Probate Divisions	Part I.

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